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Supreme Court of the United States

OCTOBER TERM, 1966

NO. 737

BLOOMFIELD STEAMSHIP COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

Bloomfield Steamship Company (hereinafter "Bloomfield") prays that a writ of certiorari issue to review the judgment of the United States Court or Appeals entered in the above cause on August 4, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals (Tuttle, C. J.) is reported at 359 F.2d 506 and also appears in the appendix to this petition.

The opinon of the District Court (Noel, D. J.) is not reported; it appears in the appendix to this petition.

JURISDICTION

The original judgment of the Court of Appeals was entered on April 29, 1966, and by its order of May 19, the Court extended time for the filing of a petition for rehearing until June 6, 1966. The petition was timely filed on June 4, and denied by an order made on August 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. The Cargo Preference Act requires that 50% of foreign aid cargo be shipped in "United States-flag commercial vessels to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels."

Did rates for wheat so required to be shipped U.S.-flag, rates expressly found and conceded to be "fair and reasonable," become unlawful when it appeared that the carrier, to meet foreign flag competition, charged lower rates for the carriage of grain not required to be shipped U.S.-flag?

2. The regulations of the International Cooperation Administration ("ICA") required ocean carriers to certify that a rate charged on an ICA financed shipment of wheat did not exceed its rate paid to it for "similar ocean transportation services *by other customers similarly situated.*"

Are "other customers" who ship agricultural commodities not required to be shipped U.S.-flag "similarly situated" to those who ship Government-aided agricultural commodities required to be shipped U.S.-flag?

3. Is the general language of the Shipping Act of 1916 applicable to matters arising under the specific Cargo Preference Act?

4. According to the evidence and the findings of the District Court, ICA, specifically and in advance approved the rates at issue here, and for many years Congress, the Comptroller-General, other interested Government agencies and, in at least one instance, the courts have recognized that U.S.-flag rates under the Cargo Preference Act substantially exceed foreign flag rates for agricultural commodities, and the Department of Agriculture, under whose programs the commodity here involved (wheat) is principally shipped, have recognized the "U.S.-flag differential" in official forms and regulations and has at least in some instances itself approved the shipment of bulk agricultural commodities (grains) required to be shipped U.S.-flag at U.S.-flag differential rates. R. 42, 67-75.

Is it in accordance with the equitable principles of the law of restitution now to permit the Government to recover back the "U.S.-flag differential" because Bloomfield carried commodities not required to be shipped U.S.-flag at foreign flag rates?

STATUTES AND REGULATIONS INVOLVED

Cargo Preference Act, 46 U.S.C. §1241(b) (sometimes referred to as "Public Law 664"; it was Public Law 664 of the 83d Congress):

> "§1241. Transportation in American vessels of Government personnel and certain cargo . . .
>
> "(b) Whenever the United States . . . furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, . . . the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure

that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels . . ."

Agricultural Trade Development and Assistance Act, 7 U.S.C. §1702(a), Act of October 8, 1964 (involved only as evidencing Congressional recognition of the U.S.-flag differential):

". . . The Commodity Credit Corporation shall finance ocean freight charges incurred pursuant to agreements entered into after December 31, 1964, only to the extent that such charges *are higher* (than would otherwise be the case) by reason of a requirement that the commodities be transported in United States-flag vessels. . ."

Regulations of the United States Department of Agriculture (as in effect in 1958 and 1959; §11.12 has not differed in respects relevant here since originally promulgated in 1954 to the present day):

"§11.12(b). *Where it is required that the commodity be shipped on a United States-flag vessel, CCC Form 106 will set forth the amount of the ocean freight differential, if any, which CCC will recognize as existing between the prevailing foreign-flag vessel rate and the United States-flag vessel rate.*"

Regulations of the International Cooperation Administration:

"§201.6. General provisions deemed incorporated in PAs and PIOs.

. . .

"(n) U.S.-flag vessel shipping requirement — (1) Scope of cooperating country responsibility. The cooperating country will ensure that at least 50 percent of the gross tonnage of all ICA-financed commodities . . . is transported on privately-owned U.S.-flag commercial vessels . . ." [involved in that in the contract with West Germany under which the shipments here at issue were made the requirement to ship 50% U.S.-flag was expressed by a reference to this regulation followed by I.C.A.'s undertaking to reimburse West Germany the differential rate; see pagee 20 and 53a]

"§201.7. Ocean transportation.

. . .

"(b) Rate limitations. The rate charged by a supplier of ocean transportation services shall not exceed the prevailing rate for similar freight contracts nor the rate paid to the supplier for similar ocean transportation services by other customers similarly situated."

§§*16 and 17 of Shipping Act of 1916*, 46 U.S.C., §§815 and 816:

"§16. It shall be unlawful for any common carrier by water . . .

"First: To make or give any *undue or unreasonable* preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . ."

"§17. No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is *unjustly discriminating* between shippers . . . "

Other statutes involved, although their meaning is not at issue, are:

"Public Law 480," or "P.L. 480," viz., the Agricultural Trade Development and Assistance Act, 7 U.S.C. §§1691-1736; the Act of July 10, 1954; 68 Stat. 459. This statute includes four Titles, each authorizing a different category of programs for the use of agricultural commodities in foreign aid. These programs are administered by the Department of Agriculture and the Commodity Credit Corporation ("CCC"). This statute was Public Law 480 of the Eighty-Third Congress.

The Mutual Security Act of 1954, 22 U.S.C. §1922; Act of August 26, 1954, 68 Stat. 843. This statute also authorizes programs for the use of agricultural commodities in foreign aid. These programs were administered during the shipments at issue here by the agency then known as International Cooperation Administration ("ICA"), now Agency for International Development.

STATEMENT OF THE CASE

The Rate Differential in Agricultural Commodities Created by the Cargo Preference Act

We have stated the questions in the case in legal terms. In practical terms the question is this: Does a U.S.-flag carrier of agricultural commodities who has been paid fair and reasonable rates within the meaning of the Cargo Preference Act for cargoes of agricultural commodities required to be shipped U.S.-flag forfeit the differential by which those rates exceed world market rates if to utilize vacant ship space he carries at world market rates agricultural commodities not required to be shipped U.S.-flag?

Since the enactment of the Cargo Preference Act there has existed a universally recognized rate differential in the shipment of agricultural commodities, including wheat, from the United States to foreign countries: one set of rates for the 50% of Government-aided agricultural commodities required by that act to be shipped in U.S.-flag ships and a different and lower set for those not so required (those not so required consisting of the remaining 50% of Government-aided agricultural commodities and agricultural commodities shipped commercially).

With respect to agricultural commodities, including wheat, with which this case is concerned, Government-aided shipments and the consequent demand for cargo space have been enormous. Government-aided shipments of agricultural commodities have been primarily under Title I of Public Law 480; shipments under Titles II, III and IV of Public Law 480 and under the Mutual Security Act of 1954 have been substantial but relatively insignificant compared with those under Title I, Public Law 480.[1]

As the Cargo Preference Act has required that 50% of these shipments be in U.S. flag ships, and as the U.S. merchant marine is less than 10% of the world shipping fleet,

---

[1] According to CCC's "Summary of 30 Years' Operations," published in 1964 (page 43):

> "For all Public Law 480 programs, CCC provides surplus commodities for shipment abroad . . .
>
> "Since 1954, more than 116 million tons of American farm products have moved to foreign consumers in commercial sales, donations, and other provisions of the Act. This has included 3 billion bushels of wheat and wheat products . . . 8.7 million bales of cotton . . . 100 million bags of rice, 6.6 billion pounds of vegetable oil, 477 million bushels of feed grains . . ."

Additionally CCC shipped abroad 2,263,147,729 bushels of wheat between 1949 and 1964 under the International Wheat Agreement of 1949. "Summary," page 41.

infra page 14, the natural operation of the law of supply and demand has resulted in rates for agricultural commodities, including wheat, on U.S.-flag ships that are far higher than world market rates.

This U.S.-flag differential has been recognized by all concerned—most of all by the Government agency primarily concerned with the shipment abroad of Government-aided agricultural commodities, viz., the Department of Agriculture, but also by Congress, the Comptroller-General, the Department of Commerce, the Maritime Administration, the Interagency Maritime Task Force, and other agencies, including ICA in the very contract with the Federal Republic of Germany under which the shipments of wheat at issue here were made, and by the Attorney-General. According to CCC, *infra* page 14, the U.S.-flag differential rate is about twice the foreign flag rate.

Obviously a carrier under these circumstances would prefer to carry Government-aided agricultural commodities required to be shipped U.S. flag, but, despite their volume, these are not always available, nor is other, general, cargo. Indeed because world market rates on agricultural commodities are fixed by foreign flag tramps, exceedingly low cost operators, the lowest in the world in fact, agricultural commodities at world market rates are highly unrewarding cargo. A U.S.-flag line would accept them only if desperate to fill an otherwise partially empty ship.

Because Bloomfield accepted agricultural commodities at the world market rate at a time when it was also carrying such commodities (wheat) at the U.S.-flag rate, the Court of Appeals has held that it was guilty of unlawful discrimination.

We shall now demonstrate our assertion that a U.S.flag differential on agricultural commodities required, to be shipped U.S.-flag was consciously enacted and kept by Congress and recognized and administrered by all interested Government agencies and the courts. Not only was there no warning that the differential would be forfeited by the carriage of commodities not required to be shipped U.S.-flag at world market rates, but the record here establishes that CCC was simultaneously approving the carriage of bulk agricultural commodities required to be shipped U.S.-flag at differential rates and the carriage on foreign-flag vessels of like commodities at foreign flag rates. R. 42, 67-75.

According to the Attorney-General, Congress recognized that the Cargo Preference Act would cause, and, later, that it had caused a U.S.-flag differential on agricultural commodities, but nevertheless it enacted the Cargo Preference Act and subsequently refused to repeal it. The attitude of Congress respecting the U.S.-flag differential on agricultural commodities has been well stated by the Attorney-General in an opinion he rendered to the Secretary of Agriculture on August 29, 1963 (42 Op. Atty. Gen., Op. No. 14). The question was whether sales of agricultural commodities under Title IV of Public Law 480 fell within the Cargo Preference Act. In the course of the opinion the Attorney-General said (42 Op. Atty. Gen., Op. No. 14, page 14):

> "The discussions of the Cargo Preference Act before the House Committee on Merchant Marine and Fisheries show a recognition of the fact that the act would cover the shipment of surplus commodities. *It was realized that the cargo preference requirement with respect to the disposition of agricultural surplus com-*

modities under Public Law 480 would increase the ocean shipping charges . . .

"In 1956, the Senate Committee on Agriculture and Forestry inserted in S. 3183, one of the bills which finally resulted in the Agricultural Act of 1956 (70 Stat. 188), *a section 307 which would have exempted transactions under title I of Public Law 480 from the Cargo Preference Act* (S. Rept. 1484, 84th Cong., 2d sess., pp. 25-27). *This section was eliminated from the bill after a prolonged and searching debate on the floor of the Senate* (102 Congressional Record, 4975-4991). During the same session of Congress, the Senate Committee on Interstate and Foreign Commerce and the House Committee on Merchant Marine and Fisheries held lengthy hearings on the same question and concluded that there was no reason to exempt shipments under title I of Public Law 480 from the coverage of the Cargo Preference Act [citing hearings on S. 2584 of the 84th Congress, which also would have repealed cargo preference on Title I, Public Law 480 programs]."

[Because agricultural commodities carried under Title I, Public Law 480, exceed many times over those carried under other statutory authorizations, the practical effect of eliminating Title I, Public Law 480, agricultural commodities from the Cargo Preference Act would have been to repeal the rate differential. The remaining agricultural commodities would not have been sufficiently substantial in relative volume to have brought about a U.S-flag rate appreciably higher than the world market rate.]

In the "prolonged and searching debate on the floor of the Senate" the proponents of repeal of cargo preference, such as Senator Aiken of Vermont and Senator Mundt of South Dakota, forcefully made the point of increased cost

of ocean transportation. The advocates of cargo preference, including Senator Butler of Maryland and Senator John F. Kennedy of Massachusetts, did not deny the existence of rate differentials brought about by the Cargo Preference Act. Nevertheless the Cargo Preference Act repealer was eliminated from the bill by a vote of 57 to 23 on March 16, 1956 (102 Congressional Record, 4991).

S. 2584 of the 84th Congress, also providing for such repeal, never got out of Committee. Since the 84th Congress no bill has been introduced to repeal or modify the Cargo Preference Act.

We could cite many passages from Congressional hearings and reports showing that Congress was aware of the effect, both as anticipated and as realized, of cargo preference on ocean transportation rates on agricultural commodities, but as the Attorney-General put it so well in an official opinion, further elaboration seems unnecessary.

We do, however, note that at a hearing before the House Merchant Marine Committee on February 10, 1955, Mr. Arthur G. Syran, Director, Office of Transportation, Foreign Operations Administration, the name of ICA at that time, showed complete familiarity with U.S.-flag rate differentials and indeed introduced in evidence a rather elaborate table showing the rate differentials on grain shipped to Yugoslavia (page 50). Representatives of other interested Government agencies also showed such familiarity. These hearings and the Committee's subsequent report were referred to and relied on both by the Attorney-General in the opinion quoted from *supra* page 9, and by the District Judge in upholding Bloomfield's complaint (R. 381-391).

We must also mention that on October 8, 1964, Congress enacted a provision that in Public Law 480 programs CCC should pay *only* the U.S.-flag differential, *supra* page 4, certainly recognition that there was one.

The Department of Agriculture formalizes U.S-flag differentials. The Government agency administering by far the largest foreign aid programs relating to agricultural commodities, including wheat, that is to say, those under Public Law 480, is the Department of Agriculture, particularly its unit CCC.

Soon after the enactment of the Cargo Preference Act the Department of Agriculture on November 22, 1954 issued Regs. §11 (7 C.F.R. 11). §11.12, entitled, Ocean Transportation, providing for a "Form 106" on which there was to be stated, in those cases in which the Department, pursuant to the Cargo Preference Act, had required U.S. flag shipment, the "ocean freight differential . . . between the prevailing foreign-flag vessel rate and the United States-flag vessel rate." The Department undertook to reimburse the supplier the amount of the "ocean freight differential."

We set forth below the relevant sections of Form 106. The form itself is, of course, blank, but for purposes of illustration we have filled it in with material, in brackets, extracted from the form 106 before the Court in *Cargo & Tankship Management Corp. v. India Supply Mission v. United States*, 221 F.Supp. 680 (S.D.N.Y.), modified 336 F.2d 416, in which the Court of Appeals of the Second Circuit enforced a U.S. flag differential against the Government; cf. *infra* page 18.

FORM CCC-106-2
(Rev. 4-7-64)

U. S. DEPARTMENT OF AGRICULTURE
Commodity Credit Corporation

ADVICE OF VESSEL APPROVAL (OCEAN CARRIER)

NO. (17,489)

DATE OF ISSUANCE (May 31, 1962)

DATE OF FIRST APPROVAL (March 12, 1962)

The fixture described below is hereby approved as requested under the applicable provisions of Public Law 480 and specifically covered by the purchase authorization shown at right. Make no changes on this form. Should changes become necessary, communicate immediately with the office shown in the approval space for appropriate instructions.

COUNTRY (India)

PURCHASE AUTHORIZATION NO. (39-65 01)

P.L. 480 PROGRAM (Check one)
TITLE I ☐ TITLE IV ☐

NAME AND ADDRESS OF SUPPLIER OF COMMODITY
(Continental Grain Co.
2 Broadway
New York 4, New York)

TYPE OF VESSEL (Check one)
LINER ☐ TANKER ☐ DRY BULK CARRIER ☒

NAME OF VESSEL (SS "MOUNT EVANS)

FLAG OF VESSEL U.S.

COMMODITY (Wheat)

APPROXIMATE WEIGHT OF COMMODITY (Long tons) (1,000 Long Tons)

LOADING RANGE (U.S. Gulf Coast)

ESTIMATED LOADING DATE(S) (April 15 - May 18, 1962)

DESTINATION (Vizagapatan and Calcutta, India)

LOADING COSTS TO BE PAID BY (Check one) VESSEL ☒ SHIPPER ☐

DISCHARGE COSTS TO BE PAID BY (Check one) VESSEL ☐ CONSIGNEE ☒

OCEAN FREIGHT RATE ($28.00) PER (Long Ton)

OCEAN FREIGHT DIFFERENTIAL $ (18.27) PER (Long Ton)

REMARKS: differential

Ocean freight to be financed by CCC ☒ Ocean freight not to be financed by CCC ☐
Notice of arrival is required ☐ Notice of arrival is not required ☒

(Ocean freight to be financied by CCC.
Notice of arrival is required.)

(The differential as stated on this Form 106 is final for this shipment and is not subject to adjustment.)

(This supersedes CCC Form 106 Number 17,489 issued on March 30, 1962.)

APPROVED

U. S. Department of Agriculture
Foreign Agricultural Service
Program Operations Division
Washington, D.C. 20250

FOR: (Director, Program Operations Division)

THIS ADVICE SENT TO

INSTRUCTIONS: The signed original of this form must be submitted with the first request for reimbursement in connection with the above-described shipment.

ORIGINAL

Thus from the very inception of operations under the Cargo Preference Act the Department recognized that there was a "foreign-flag vessel rate" and a "United States-flag vessel rate" and a difference between them called the "ocean freight differential."

In its "Summary of 30 Years' Operations," CCC said (page 48):

> "The CCC pays certain ocean transportation for commodities shipped on U.S.-flag vessels . . .
>
> "With use of both U.S. and foreign vessels, this is a complicated task. Provisions of the Cargo Preference Act must be followed, which direct that U.S.-flag vessels must be used for at least 50 percent of the tonnage shipped. *The great variance between U.S.-flag rates and foreign flag rates requires careful analysis.*
>
> "Under Title I and Title IV of P.L. 480, CCC *pays the difference between U.S.-flag rates and foreign flag rates on the U.S.-flag vessels required to be used, or about half the costs.*"

In order to ascertain the differential between U.S.-flag rates and foreign flag rates on grains being shipped steadily and in large quantities, and also because CCC was shipping equally large quantities of agricultural commodities at foreign-flag rates, it was of course necessary for CCC officials to keep closely informed of day to day fluctuations both in U.S.-flag rates and foreign flag rates. The record shows in some detail how this was done (R. 186-189; 247-251).

Further recognition. On May 17, 1965, the Department of Agriculture issued a statement "in answer to the complaints made by the maritime interests with respect to the handling of ocean transportation."

Inter alia the Department said:

> "Cargo preference results in very substantial Government costs that would not otherwise be incurred . . . [CCC] costs for cargo preference will be reduced by the new provision of law enacted last year [referring to the Act of October 8, 1964; 7 U.S.C. §1702(a), supra, page 4] which will limit [CCC] financing of ocean freight on Title I cargoes to the differential by which the ocean freight on United States-flag vessels exceeds the rate on foreign flag vessels . . ."

The Comptroller-General recognizes the U.S. flag differentials. On September 23, 1958, while some of the shipments here at issue were being made, the Comptroller-General addressed a letter to the Secretary of Agriculture, saying in part (38 Comp. Gen. 229):

> "You advise that in carrying out programs involving the exportation of surplus agricultural commodities and products thereof, pursuant to the Agricultural Trade Development and Assistance Act of 1954, as amended, Public Law 480, 83rd Congress, your Department aids in financing the cost of ocean transportation; but, generally, this is limited to payment by the Commodity Credit Corporation to private exporters of the additional costs of freight moving on American vessels as required by the Cargo Preference Act over what would have been the cost had the freight moved on foreign flag vessels."

The rest of the letter, on the foregoing premise, classifies various types of vessels for purposes of the Cargo Preference Act.

Under the Budget and Accounting Act, 1921, and the Accounting and Auditing Act, 1950 (31 U.S.C. §§53, 67)

the Comptroller-General audits the books of the agencies of the Executive Branch. No record has been found of any criticism by him of the payment of U.S. flag differentials.

The Department of Commerce recognizes the U.S.-flag rate differential. In a "Review of Direct and Indirect Types of Maritime Subsidies with Special Reference to Cargo Preference Aid" submitted by the Secretary of Commerce to the President of the United States on April 20, 1956, the Secretary said (page 16):

> ". . . [F]oreign governments making agreements with the United States regarding surplus agricultural products are not charged for any portion of the ocean transportation cost resulting from the use of United States flag vessels to the extent that the rates of those vessels exceed the rates that would have been paid to foreign flag vessels for the same transportation service."

The Maritime Administration recognizes the U.S.-flag differential. In a report submitted on November 19, 1965 by the Maritime Administrator to the Joint Economic Committee of Congress, the Administrator said (page vi):

> "The total value of freight payments for the movement of Public Law 480 cargoes [which are necessarily agricultural commodities, supra page 6] amounted to almost $222 million. This includes more than $81 million in rate premiums which represents the difference between world market rates and the rate required by U.S.-flag ships."

At the hearing before the House Merchant Marine Committee in 1955 referred to in the opinion of the District Judge (R. 381-389; 20a-28a) it was suggested that the

maritime administration, as the Government agency most familiar with the maritime affairs, issue advices to other Government agencies from time to time as to "fair and reasonable rates for United States-flag commercial vessels." Responsive to this suggestion the Maritime Administration did issue such advices. The last such advices, issued shortly prior to the time of the first of the shipments at issue here, was that for shipments from the U.S. Gulf to "Bremen/Hamburg/Emden" the "fair and reasonable rates for United States-flag commercial vessels" were $16.02 winter loadline and $15.83 summer loadline.*

These rates are, of course, much higher than those charged on any of the shipments at issue here and almost three times what were then foreign flag rates, as the Maritime Administration presumably knew.

The Interagency Maritime Task Force recognizes U.S.-flag differentials. Last year there was an "Interagency Maritime Task Force" headed by the Under Secretary of Commerce for Transportation, and including representatives of the Departments of State, Defense, Agriculture, and Labor, and of the Bureau of the Budget, the Council of Economic Advisers, the Federal Maritime Commission and the Maritime Administration. This Task Force said in its Report (page 35):

> "American-flag ships at present carry about 7 million tons annually [in United States foreign trade in dry bulk cargoes], practically all of which is cargo preference cargo moving under P.L. 480 and *reserved to U.S.-flag ships at rates much higher than world rates.*"

* For full cargo lots on certain type U.S.-flag vessels. The rates for cargo lots do not differ substantially from, and are certainly not substantially higher than, those for parcel shipments.

The Task Force deplored the small proportion of United States foreign trade in commercial dry bulk cargoes carried by U.S. flag ships—a point of view not advanced by the decision of the Court of Appeals.

The Courts enforce a U.S.-flag differential. In *Cargo & Tankship Management Corp. v. India Supply Mission v. United States*, 221 F.Supp. 680 (S.D.N.Y.), modified 336 F.2d 416 (C.A.2d), all parties, including the United States, and both courts took the validity of the "ocean freight differential" for granted; the controversy concerned the adjustment of claims in the light of an unexpected event, viz., the ship's breakdown and the consequent transshipment of the cargo of wheat to a foreign flag vessel. The District Court described the mechanics of operation of the Cargo Preference Act as follows (221 F.Supp. 682):

> "The charter party was then submittel to CCC. This was required by the Regulations (7 CFR 11.12(a)) which state that approval will be given on 'Form 106', elsewhere defined as 'Advice of Vessel Approval' and designated '106-2' for ocean carriers. In this instance three Advices of Vessel Approval were issued. Each Advice of Vessel Approval stated an 'ocean freight differential', in amount $18.27 for 1,000 tons, $15.84 for 4,370 tons, and $16.20 for 4,970 tons. This differential is that between the foreign-flag freight rate and the United States-flag freight rate and is important because when (as here) it is required that shipment be made in a United States-flag ship, the Regulations are so drawn that the added expense of the differential is not borne by the importing country but the United States."[2]

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[2] It is a commentary on the problems of the U.S. merchant marine that the carrier was in bankruptcy at the time suit was brought. United States District Court, Southern District of New York, Docket #63B-216.

Part of the carriage was by the U. S. flag ship Mount Evans, but because of her breakdown, the cargo was transshipped foreign flag and carried the rest of the way to India. The Court of Appeals held that, at 336 F.2d 421:

> ". . . contrary to the decision of the lower court, respondents (India) are entitled to reimbursement for so much of the freight charges as are attributable to carriage from the gulf port of Galveston to Norfolk, Virginia, the point of transshipment. On this leg of the voyage the cargo was carried in the approved American vessel, S. S. Mount Evans. . . . [T]he general purpose of the American flag vessel requirement, the promotion of American shipping, was served here to the extent of the carriage to Norfolk and the freight charges so occasioned."

THE PARTICULAR SHIPMENTS HERE AT ISSUE

The shipments here at issue were of wheat, but unlike most shipments of that commodity were shipped pursuant to an ICA program rather than a CCC or other Department of Agriculture program. As indicated by ICA Regulation 1, §201.6(n), *supra* p. 5, ICA delegates to the beneficiary country the duty to see to it that 50% of the cargo is shipped U.S.-flag, but couples that requirement with its own undertaking to reimburse the beneficiary country the amount of the U.S.-flag differential. Thus in the contract with West Germany under which the shipments here at issue were made it was provided by §3 (53a)

> "3. The Government of the Federal Republic of Germany agrees [to comply with ICA Regulation 1,

> §201.6(n), i.e., to ship 50% U.S. flag]. The ICA will reimburse the Government of the Federal Republic of Germany in Deutsche Mark in the amount *by which the transportation costs incurred for shipment on U. S. flag commercial vessels exceed transportation costs which would have been incurred per shipment as of the same time on non-U. S. flag commercial vessels.*"

The wheat was shipped in bulk, but in so-called "parcel shipments" (less than full ship load). During the period of these shipments Bloomfield also carried parcel shipments of grain to Germany at world market rates.

The rates on the shipments to West Germany sponsored by ICA ($10-$11 per ton; R. 43-50) correspond to those then being approved by CCC for wheat shipments to Poland ($11.18-14.32 per ton for wheat; R. 67-70) and those approved by the Department of Agriculture for wheat shipments to Austria through German ports (R. 42, 75). A number of these shipments to Poland were on Bloomfield's ships, indeed on the same ships that carried the shipments at issue here (the S.S. Neva West, Alice Brown, Margaret Brown and Lucille Bloomfield) (R. 43-50, 67); the rates of these shipments to Poland and Austria have never been challenged.

The rates on the grain taken at world market rates to fill otherwise unused vessel capacity ($4.50-$6.75 per ton; R. 43-50) corresponded generally with the foreign flag rates ($4.69-$6.71 per ton) then being charged for grain shipments to Poland with the approval of CCC for Government-aided grain with respect to which U.S.-flag shipment was not required (R. 71-75).

Advance approval by ICA after prolonged negotiations. Since no one from ICA testified, it is not known whether ICA has a form corresponding to CCC form 106. Nevertheless,

Mr. Arthur S. Mason, Acting Head, Ocean Transportation Branch, Department of Agriculture, testified that he had been consulted respecting the rates on the shipments at issue here and had given his approval of them, usually orally by telephone, to Messrs James and Duane of the ICA office of Transportation. The suggestion that ICA had adopted this sensible and prudent course was angrily rejected by the Government attorneys, who nevertheless failed to call Messrs. James and Duane. According to Mr. Mason, rates tentatively agreed upon in Germany between the German importers and Bloomfield's agents there were substantially reduced as a result of his guidance. The negotiations were long and exhaustive. On this and other evidence reviewed at R. 399-405, the District Judge found as a fact that ICA had given advance approval to these rates (R. 406-407). The Court of Appeals did not disturb this finding. But cf. *infra* page 25.

Should Bloomfield have refused the "commercial" shipments and sailed its ships with empty holds? As already noted, *supra* page 8, agricultural commodities at foreign flag rates are not rewarding cargo. Bloomfield took these shipments only to fill otherwise partially empty ships, and to make sure it was offered Cargo Preference Act cargoes. (Interrogatory 32 to Dunn, R. 81 and 94.) We are unable to see the advantage to the U. S. Government, its merchant marine or to its economy generally to force Bloomfield to reject such shipments—but if such rejection is the price of the continued carriage of agricultural commodities at U. S. differential rates Bloomfield would have no choice.

Bloomfield's agents sign the allegedly false certificate. To obtain payment for the ICA sponsored cargo freights, Bloomfield's agents as required by ICA Regulation 1 sub-

mitted invoices for the amount of the freight moneys due according to the bills of lading to the agent for the cargo (R. 65-66). On the back of each invoice was a printed form, entitled "Supplier's Certificate": the supplier, viz., Bloomfield, certified, among other things, that the rate charged on these shipments did not exceed:

> ". . . the rate paid to the supplier for similar services by other customers similarly situated." (R. 66)

THE SUIT

Bloomfield brought suit against the Government for a declaratory judgment that it had no liability respecting these freight moneys (R. 4-24). The jurisdiction of the District Court was invoked under 28 U.S.C. §1331 and §1345, and also §2201 and §2202 (Declaratory Judgment Act).

The Government answered, with a counterclaim stated to be equitable in nature demanding $270,380 in restitution for alleged overcharges (R. 24-33).

THE DECISION OF THE DISTRICT COURT

The District Court (Noel, D. J.) sustained the complaint and dismissed the counterclaim. Specifically with respect to Bloomfield's rates on the shipments in question, the District Court found (R. 406):

> "1. Such rates were fair and reasonable;
>
> "2. Such rates were not in excess of prevailing rates on shipments under the Cargo Preference Act;
>
> "3. Such rates did not exceed those rates which Bloomfield would have charged other shippers for govern-

ment financed cargoes under the Cargo Preference Act;

"4. Such rates comply with the valid and applicable I.C.A. regulations;

"5. Such rates did not exceed (a) those prevailing for similar freight contracts, nor (b) those paid to suppliers for similar ocean transportation, at or about the same time by other customer's similarly situated;

"6. Those Bloomfield customers which shipped commercial grains on Bloomfield vessels, at rates which the government compared with Bloomfield's rates on government-financed grain shipments in an attempt to establish the illegality of the latter, were not similarly situated to the Bloomfield customers which contracted for the carriage of government-financed grain at rates here in controversy."

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals (Tuttle, C.J.) reversed the judgment on, as we read the opinion, two grounds:

First: A rate for agricultural commodities required to be shipped U.S.-flag higher than for similar agricultural commodities not so required violated §§16 and 17 of the Shipping Act of 1916 forbidding unreasonable preferences.

Second: Bloomfield could "validly agree [by the "Supplier's Certificate"] to carry Government-financed shipments at a charge that was competitive with its charges for commercial shippers", infra, page 7a. There was an "option to the parties to agree that cargoes carried at Government expense shall be charged at rates as low as those carried for other shippers, infra, page 9a. "... [T]here can be no justification for a conclusion that the United States should not be benefited by the contract as written," infra page 8a.

Apparent misapprehensions of the Court of Appeals. The opinion of the Court of Appeals takes for granted that by the "terms of the Supplier's Certificate" Bloomfield agreed to carry the Government-aided wheat required to be shipped U.S. flag at the same rates as it might carry similar cargo not so required.

The opinion regards the question presented by the case as being whether Bloomfield had the legal power to make such a contract and whether the Government could enforce it.

But Bloomfield has at no time denied that it had the legal power to contract to carry the wheat here involved at world market rates, or at 10¢ a ton or $100 a ton.

What counsel for Bloomfield most earnestly contended was that according to federal common law canons of contract interpretation, Bloomfield had not agreed by the Supplier's Certificate to sacrifice the U.S.-flag differential rates which had been so exhaustively negotiated, cf. *supra* page 21, in conformity with Congressional intent and Governmental approval and administrative practice.

"Similar services." In part of its opinion the Court of Appeals seems to imply that Bloomfield's certificate was that it was charging no more than for "similar services." Of course the certificate actually was that the rate was no more than had been paid for "similar ocean transportation services *by other customers similarly situated.*" The clause "by other customers similarly situated" would be redundant if it were not anticipated that some customers would be charged more than others for "similar ocean transportation services." The real question is not whether the services were similar—physically they were—but wheth-

er the customers were "similarly situated." We say that they were not.

Effect of ICA's advance approval of these rates. The opinion of the Court of Appeals reports that "counsel for Bloomfield candidly conceded" that ICA's advance approval of the rates is "significant" only if the Court finds that Bloomfield lacked legal power to charge world market rates on these shipments, infra page 9a. This statement shows that counsel for Bloomfield was unable to convey his meaning to the Court; counsel intended no such concession. We believe this advance approval highly significant as showing that by the Supplier's Certificate the parties did *not* intend that the rates be world market rates and that it will not "give offense to equity and good conscience if [Bloomfield is] permitted to retain [what it collected]." *Atlantic Coast Line v. Florida,* 295 U.S. 301, *infra* page 34.

The "double subsidy" point. The Court of Appeals several times refers to Bloomfield as being "subsidized," apparently referring to the fact that at one time Bloomfield enjoyed an operating-differential subsidy under the Merchant Marine Act of 1936 to equate its seamen's wages with those of its foreign-flag competitors. 46 U.S.C. §1171.

Bloomfield is no longer subsidized.

The point is strictly *ad hominem,* as the Cargo Preference Act refers to "privately owned United States flag-commercial vessels", drawing no distinction between subsidized and non-subsidized carriers, and expressly requiring preferences to "liners," supra, page 4. Most liners are subsidized vessels.

There is no suggestion that Bloomfield made an excessive profit, or indeed, any profit. The Merchant Marine Act

of 1936 provides for the recapture from subsidized operators of profits in excess of a certain amount on the capital investment. 46 U.S.C. §1176.

The remand was to determine "the amount of the charges in excess of the rates charged for similar commercial shipments," and, presumably, to grant judgment for that amount. The Court of Appeals did *not* remand for the determination of what rate would earn a reasonable return upon Bloomfield's invested capital or other standard of value.

The operating-differential subsidy serves only to equate wages (and certain similar expenses) paid by U.S. subsidized lines with those of foreign-flag lines on the same routes. However, foreign-flag vessels, in addition to paying low wages (in relation to United States wages), receive various kinds of assistance from their respective governments.

In a report entitled "Maritime Subsidy Policy" made by the Department of Commerce in 1954, the Department noted:

> ". . . ships under foreign-flag registry are less costly to construct and operate than comparable ships of United States registry. Even with these economic advantages, foreign governments have improved the competitive position of their respective merchant fleets by means of public assistance . . . Some countries provide mail contracts which compensate their ships to a greater degree than if the mail were transported at international rates; provide terminal facilities at low rental rates; or grant general navigation bounties based upon the type of service operated, stipulated ship characteristics, and the number of days operated."

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

The decision of the Court of Appeals to deprive a U.S.-flag carrier of differentials to which it is concededly otherwise fully entitled because it has carried at world market rates agricultural commodities not required to be shipped U.S.-flag conflicts with applicable decisions of this Court in the respects hereinafter stated. Additionally that decision, we submit:

1. Misconstrues the Cargo Preference Act;

2. Frustrates the purpose of the Cargo Preference Act to assist the U.S. merchant marine by attaching an unreasonable and inconsistent condition to its benefits;

3. Imposes an arbitrary and capricious penalty;

4. Is not only wholly without warning, but also contrary to what administrative practice had led the carriers rightfully to expect;

5. Upsets generally accepted Governmental and industry thinking and practice;

6. Not only fails to serve any national purpose, but, by in effect excluding U. S. merchant ships from the carriage of non-differential agricultural commodities, affirmatively harms the U. S. merchant marine.

The Cargo Preference Act, a highly important statute to the U.S. Merchant Marine, has never been considered by this Court. We submit that the opinion of the Court

of Appeals, with, as we see it, its narrow and mechanical construction of the relevant statutes should not be permitted to stand—with all its actual present damage to this small carrier and its immense potential damage to the U. S. merchant marine, certainly none too prosperous now. According to a public report issued by the Maritime Administration in 1964, the United States merchant marine has declined in tonnage relative to that of the entire world as follows (page 6):

Year	Total World	U. S. Privately Owned	Percent of World
1954	89,258,000	9,645,000	10.8
1959	117,640,000	9,519,000	8.1
1963	137,657,000	10,076,000	7.3

According to the same report (page 22), the percentage of United States foreign trade carried in U. S. flag liner service declined from 37.7 in 1954 to 29.2 in 1963, in U. S. flag irregular service from 17.8 in 1954 to 5.2 in 1963; and in U.S. flag tankers (which carry agricultural commodities as well as liquid cargo) from 23.0 in 1954 to 4.4 in 1963.

2. The Court of Appeals has decided, in conflict with applicable decisions of this Court, that rates otherwise fair and reasonable, have become unlawful because, in order to meet competition, a carrier charged lower rates for similar transportation.

Bloomfield charged the lower rates on commercial grain because that was all it could get: it was forced to charge the world market rate.

This Court has long recognized that when, in order to meet competition, lower rates have been charged for transportation comparable in the physical sense, the higher rate does not thereby become unlawful.

In *Texas & Pacific Ry. Co. v. Interstate Commerce Commission,* 162 U.S. 197, a case arising under §3 of the Interstate Commerce Act, forbidding unlawful preferences and corresponding to §§16 and 17 of the Shipping Act of 1916, this Court upheld, on the ground of competition, a rate for the carriage of goods inland from port cities when such carriage originated in that city higher than the rate applicable when the goods carried had been imported from abroad on a through bill of lading. ". . . [A] low rate to secure foreign freights which would otherwise go by competitive routes" was not "unjust". 162 U.S. 234.

In *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, also arising under §3, the Court said at page 636:

> "The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination."

In *Ayrshire Collieries Corp. v. United States,* 335 U.S. 573, again construing §3, the Court said at page 592:

> ". . . Yet all that appellants attempt here is to show that discrepancies in rates are not warranted by any difference in transportation conditions or distance. That is not enough provided the Commission was justified in considering the element of competition.
>
> "We think it was . . ."

In *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U.S. 144, this Court dealt with §4 of the Interstate Commerce Act, forbidding higher rates for a shorter haul *"under substantially similar circumstances and conditions."* In that case this Court upheld a higher rate for the carriage of goods from New York to Troy, Alabama, than to Montgomery, Alabama, although the trains ran right through Troy on their way to Montgomery, which was fifty-two miles further distant. The rationale of the decision was that lower rates to Montgomery were necessary to meet competition from water carriers and other railroads. 168 U.S. 166, 171-173.

These decisions have been many times followed, e.g., *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U.S. 648; *Intermountain Rate Cases*, 234 U.S. 476, 482-483 (the cases are summarized at page 483).

The Court of Appeals cited *Wight** *v. United States*, 167 U.S. 512, involving shippers over the same line and involving a construction of §2 of the Interstate Commerce Act. But §2 of the Interstate Commerce Act has no counterpart in the Shipping Act of 1916. Moreover, this Court explained *Wight v. United States* in the *Alabama Midland Ry. Co.* case, saying that in the *Wight* case "there was no room for the operation of competition". 168 U.S. 167.

But in this instance all shippers not required to ship U. S. flag may freely avail themselves of foreign flag ships. Hence there is not only "room for competition", but exceedingly active competition.

As this Court said in *L. T. Barringer Co. v. United States*, 319 U.S. 1, 6:

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* Misspelled White by the Court of Appeals.

> "Section 2 [of the Interstate Commerce Act] is aimed at the prevention of favoritism among shippers."

Certainly it cannot be seriously suggested that Bloomfield charged world market rates on the commercial shipments out of favoritism. It charged those rates because those were the prevailing rates in the absence of a requirement that the grain be shipped U. S. flag.

3. The Court of Appeals has construed, in conflict with applicable decisions of this Court, the Supplier's Certificate without regard to the circumstances in which it was executed by Bloomfield.

As the Supplier's Certificate is a Government contract, its construction is a matter of federal common law. *United States v. Clearfield Trust Co.*, 318 U.S. 363.

According to this Court, *Nash v. Towne*, 5 Wall. 689, 699:

> "Courts, in the construction of contracts, . . . place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them and so as to judge of the meaning of words and the correct application of the language to the thing described."

Having regard to the circumstances in which Bloomfield signed the Supplier's Certificate, and the other portions of ICA Regulation 1 which expressly incorporate the Cargo Preference Act requirements, it could not have been intended by Bloomfield as, nor understood by ICA to be, an agreement to charge the same rate on this Government-aided agricultural commodity required to be shipped U.S.-flag as Bloomfield was then charging commercial shippers.

The U.S.-flag differential on agricultural commodities had been, as we have seen, well-known for a number of years to Congress, to the Government agencies concerned with the ocean shipping of agricultural commodities, and necessarily to the maritime industry. It can not have been within the remotest dreams of Bloomfield's agents that a customer not required to ship U.S.-flag was similarly situated to one who was.

And besides this general background, there were relevant particular factors. For a period of two years Bloomfield was simultaneously negotiating rates in the $10.50 area and signing Supplier's Certificates that, according to the Court of Appeals, constituted contracts to carry the same wheat for rates in the $5.50 area. How pointless the separate rate negotiations were if any such result had been intended by the parties or their negotiating agents!

4. The Court of Appeals has decided, in conflict with applicable decisions of this Court, that the general language of the Shipping Act of 1916 is applicable to matters arising under the specific Cargo Preference Act.

It is an elementary rule of statutory construction that:

> "Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 207.

This language was cited with approval by this Court in its recent decisions in *McEvoy v. United States*, 322 U.S. 102, 107, and *Bulova Watch Co. v. United States*, 365

U.S. 753, 758. Earlier decisions by this Court enunciating this rule are *Kepner v. United States*, 195 U.S. 100, 125; *Townsend v. Little*, 109 U.S. 504, 512.

Here the Cargo Preference Act provides that:

> ". . . [T]he appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such . . . commodities . . . which may be transported on ocean vessels shall be transported on privately owned United States flag commercial vessels, *to the extent that such vessels are available at fair and reasonable rates for United States-flag commercial vessels* . . ."

According to this language the agency concerned should not ship U.S. flag at all, until it has ascertained that a U.S. flag ship is available at "fair and reasonable rates," as the CCC does. No retrospective review and no challenge for preference such as is provided by the Shipping Act of 1916 are contemplated.

The Shipping Act contemplates a rate standard, below which a carrier's rates in a particular instance may fall to benefit a favored customer. The Cargo Preference Act is the reverse. It contemplates a rate standard, i.e. the world market rate, above which, in a particular instance, viz., Government-aided cargo, the carrier's rates may rise for its own benefit. To hold that a carrier violates the Shipping Act, because, when the circumstances do not exist by reason of which it can charge a higher rate, it charges the standard rate, is, we submit, to pervert the Cargo Preference Act.

5. The Court of Appeals has, in conflict with applicable decisions of this Court, required a carrier to make restitution of rates collected with the sanction of federal agencies without a showing that equity and good conscience will be offended if the carrier retains the money.

In *Atlantic Coast Line v. Florida*, 295 U.S. 301, this Court denied restitution of moneys collected by a carrier under the sanction of an erroneous order of the Interstate Commerce Commission respecting rates. The Court said at page 301:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. [citations] *The claimant to prevail must show that the possessor will give offense to equity and good conscience if permitted to retain it* . . . The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it."

The District Court, finding that ICA had given its advance approval to the U.S.-flag rates and that Bloomfield had reasonably and in good faith believed itself entitled to charge U.S.-flag rates, refused "to grant a crippling $270,000 recovery" on the further ground that restitution would be inequitable (R. 408).

We submit that the general understanding in Congress, the interested Government agencies, the courts and the maritime industry, demonstrated herein, that U.S.-flag carriers were entitled to charge U.S. differential rates on agricultural commodities required to be shipped U.S.-flag, supports that conclusion.

Under these circumstances it would be inequitable to demand restitution of the U.S. flag differential of any carrier; it is doubly inequitable that, by obscure motivation, Bloomfield should be singled out for such harassment.

CONCLUSION

A Writ of Certiorari should be granted to review the decision of the United States Court of Appeals herein.

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 21,793

UNITED STATES OF AMERICA, Appellant,

v.

BLOOMFIELD STEAMSHIP CO., Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(April 29, 1966.)

Before TUTTLE, Chief Judge, THORNBERRY, Circuit Judge, and LYNNE, District Judge.

TUTTLE, Chief Judge: This appeal complains of a decision by the trial court declaring that the appellee, Bloomfield Steamship Company, is not liable to the United States for allegedly overcharging for the ocean transportation of Government-financed grain shipments. The suit was commenced by Bloomfield's filing a complaint seeking

a declaratory judgment to the effect that it was not liable to the Government. The United States filed a counter claim seeking the recovery of approximately $270,000, the amount by which rates charged the Government allegedly exceeded those charged commercial shippers for comparable service.

Bloomfield is a subsidized American steamship company,[1] operating vessels in liner service.[2] It carried a substantial number of grain shipments to Western Germany during 1958 and 1959, which were financed by the International Cooperation Administration (ICA).[3] During the period involved Bloomfield carried 192 separate parcels of bulk grain between United States Gulf ports and ports of Northern Europe. Forty-eight of these were financed by ICA under procurement authorizations issued

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1 Bloomfield received a subsidy designed to place its operations "on a parity with those of foreign competitors." 46 U.S.C. 1171(a)(4).

2 "Liner service" is characterized by "the carriage of general cargo, the maintenance of schedules . . . and the same freight rates charged to all shippers regardless of the quantity offered." Rosenthal, **Techniques of International Trade**, 36 (1950). This is to be contrasted to "tramp service"—carriage and vessels not operating on a regular schedule or route.

3 ICA was created within the Department of State as an unincorporated agency of the United States under authority of Executive Order No. 10610 (1955), as amended (see note following 22 U.S.C. 1781 (1958)), and was authorized to implement and execute certain programs and functions specified in the Mutual Security Act of 1954, as amended, 22 U.S.C. 1750-1951 (1958). All activities of ICA were conducted pursuant to the Mutual Security Act and ICA Regulation 1, as amended, 22 C.F.R. 201.1-201.25 (1958). ICA Regulation 1 is a compilation of the administrative rules and procedures under which ICA financed the procurement of commodities and related services, including ocean transportation, for the Federal Republic of Germany and other cooperating countries during the pertinent periods.

to the Federal Republic of Germany, its agents or designees. The other 144 parcels were privately financed.

There were no conference agreements or tariffs fixing the freight rates for these shipments, but, instead, in each case they were separately negotiated and agreed upon between the agents for the German importers on the one hand, and the agents for the shipping line on the other. These negotiations culminated in "fixtures," or agreements as to the terms, and were reduced to written "booking notes" signed by the negotiators. Each booking note subjected the proposed shipment to ICA rules and regulations. The regulation pertinent to this litigation, 22 C.F.R. 201.7 (b), provides:

> "The rate charged by a supplier of ocean transportation services shall not exceed the prevailing rate for similar freight contracts nor the rate paid to the supplier for similar ocean transportation services by other customers similarly situated."

Bills of lading, issued at loading, contained similar provisions. Following the loading of ICA shipments, Bloomfield's agents billed Glaessel Shipping Corporation, agents for the cargo. Each of these shipments was then paid for with United States Government funds. Each invoice was accompanied by an executed copy of Form ICA-280, a required "Supplier's Certificate" which contained the same representation heretofore referred to:

> "The rate indicated on the reverse of this form for the service rendered does not exceed the prevailing rate, if any, for similar services, or the rate paid to the supplier for similar services by other customers similarly situated."

The privately financed shipments carried by Bloomfield during this same period were negotiated in the same manner, culminating in "fixtures" and reduced to "booking notes." The Record seems to disclose, and counsel frankly conceded on oral argument, that there were no significant differences as to the nature of the cargo or other services performed by Bloomfield Steamship Company as between the ICA-financed shipments and those that were privately financed, except for the inclusion on the former of the language subjecting the ICA-financed shipments to ICA rules and regulations. The trial court found "the parties stipulated at length to data extracted from 192 ocean bills of lading covering partial shipments of bulk grain transported during the years 1958 and 1959 between United States Gulf ports and ports of Northern Europe aboard Bloomfield vessels. These stipulations clearly show that the rates for Government financed shipments were substantially higher in all cases than the rates for commercial shipments during the same time periods. (Emphasis added)."

Although describing the Government's position as "a compelling one," the trial court nevertheless denied recovery on a theory, advanced by Bloomfield, that the ICA regulations and the bill of lading incorporating these regulations, were not to be given effect by reason of what the trial court found to be a contrary Government policy as embodied in the Cargo Preference Act.[4] This is the statute that provides that, "Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any

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[4] 68 Stat. 32, 46 U.S.C. 1241(b).

foreign nation without provision for reimbursement, any . . . commodities, within or without the United States, . . . the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such . . . commodities . . . which may be transported on ocean vessels shall be transported on privately-owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas."

The trial court held, in effect, that this provision of the statute established a policy that all shipments made because of the requirements of the Cargo Preference Act should be paid for by the United States at whatever charges were negotiated with the carrier so long as they were "fair and reasonable rates for United States-flag commercial vessels," even though the same carrier might be carrying the same commodity between the same ports for non-governmental shippers at substantially lower rates and notwithstanding agreement of the carrier as embodied in the bills of lading and the execution of the certificate of parity of charges by the carrier as has been outlined above.

The Government's claim for money had and received is based upon Bloomfield's breach of an express warranty that it was charging the Government no more than it was charging others for similar services. Bloomfield's con-

tention in the trial court and here is that these were not "similar services" because in one case the services were performed for private shippers, whereas, in the other, they were performed for the United States Government. The trial court seems to have accepted this theory when it made an express finding that the rates charged the Government "did not exceed (a) those prevailing for similar freight contracts, nor (b) those paid to suppliers for similar ocean transportation, at or about the same time by other customers similarly situated" and the further finding that "those Bloomfield customers which shipped commercial grains on Bloomfield vessels, at rates which the Government compared with Bloomfield rates on Government-financed grain shipments in an attempt to establish the illegality of the latter, were not similarly situated to the Bloomfield customer which contracted for the carriage of Government-financed grain and rates here in controversy."

These findings could be true only if the fact that in one case the Government financed a shipment and in the other it was not so financed created a dissimilarity in the shipment.

We conclude that there is no justification for a writing out of the contract between the shipper and the carrier the express warranty that the rate charged the Government did not "exceed . . . the rate paid to the supplier [Bloomfield] for similar services by other customers similarly situated." This is a case of first impression. Bloomfield cites no cases to support its contentions.

There is nothing in the Cargo Preference Act that indicates that it is intended to fix freight rates. The American shipping industry, having convinced Congress that it had grave difficulties in competing on an even basis with foreign bottoms, was the beneficiary of the subsidy provisions of the Merchant Marine Act.[5] Appellee here contends that *sub silentio* Congress also intended to provide further subsidies by having the Government pay higher rates for shipping than it might bargain for.

The thrust of appellee's contention is that, even though the Cargo Preference Act undertook to guarantee that at least 50 per cent of programmed commodities be transported by United States-flag commercial vessels, if they were available at fair and reasonable rates, and, even though Congress has provided further aid to the American flag carriers by allowing a subsidy to take up the slack between the cost of operations of foreign carriers as compared with that of American carriers as to shipments actually made, Congress also intended to prescribe that carriers could not validly agree to carry Government-financed shipments at a charge that was competitive with its charges for commercial shippers if such competitive rates are lower than rates shown to be fair and reasonable. We read no such policy in the Cargo Preference Act. In fact, it appears that the whole policy expressed in Sections 16 and 17 of the Shipping Act of 1916,[6] is to prohibit unreasonable preferences or advantages to any particular person, locality, or description of traffic. It is not reasonable to assume that Congress does not intend

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[5] Supra, fn. 1.

[6] 46 U.S.C. 815, 816.

that the American taxpayers shall benefit from this principle of non-discriminatory charges. When coupled with the express provisions of the ICA regulations and the contract freely entered into between the shipping company and the purchaser of the grain, there can be no justification for a conclusion that the United States should not be benefited by the contract as written.

The Government made no effort to attack the fairness or reasonableness of the rates here paid. Under its theory of the case, this was irrelevant. It appears that the element of fairness and reasonableness was itself related to the Government-financed shipments.[7] It does not appear that the rates are such as would have been approved as reasonable or fair if they were tested against the ordinary standard of charges for commercial shipments which were not Government-financed. It cannot therefore be said that, in insisting upon compliance with the warranty and certificate, the Government is demanding reimbursement because it has the legal right to insist on an equitable rate. It seeks only what non-governmental shippers obtained by contract, and what it also obtained by contract. There should be no distinction between them for the carriage over the same line, the same distance, and under the same circumstances. See *White v. United States*, 167 U.S. 512, 517.

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[7] The trial court said:

> "The government made no attempt to show that Bloomfield's rates on their government financed shipments were in excess of rates normally charged for similar service on **government-financed** cargoes, and there is adequate evidence to the effect that other shippers charged similar rates on **government-financed** cargoes." (Emphasis added)

Counsel for appellee candidly conceded on oral argument that appellee's contention that the particular charges here had been "approved" prior to shipment is significant only to the extent that the court accepts its theory of the case; that is to say, only if the court construes the Cargo Preference Act as requiring that the standard of rates shall be what is fair and reasonable without any option to the parties to agree that cargoes carried at Government expense shall be charged at rates as low as those carried for other shippers.

The trial court did not make a determination as to the amount of the charges in excess of the rates charged for similar commercial shipments. This determination must be made on remand.

The Judgment is REVERSED, and the case is REMANDED for further proceedings not inconsistent with this opinion.

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BLOOMFIELD STEAMSHIP CO., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

CIVIL ACTION NO. 13,809

Eikel, Feltner & Goller (Robert Eikel) of Houston, Texas; for plaintiff.

Woodrow Seals, United States Attorney for the Southern District of Texas (Jack Shepherd), and Alan Raywid, Admiralty and Shipping Section, United States Department of Justice; for defendant.

Memorandum Opinion and Order:

This action is brought under 28 U.S.C.A. §§1331 and 2201 by Bloomfield Steamship Co., hereinafter called Bloomfield, a Delaware corporation with its principal office in Houston, Texas, engaged in the operation of United States-flag vessels under a subsidy agreement with the Maritime Administration. Bloomfield seeks a declaratory judgment of non-liability for claims in excess of $270,000 which

are asserted by the United States government by virtue of alleged freight overcharges on government-financed grain shipments. The government has counterclaimed for money had and received in the amount of the alleged freight overcharges. This Court has jurisdiction.

At trial on January 13 and 14, 1964, the Court heard testimony and received in evidence the various depositions and exhibits filed herein and offered by counsel. In addition, the Court has been aided by comprehensive briefs and the able argument of counsel which was heard on January 16, 1964.

The government views the matter as a simple one, and argues that under regulations of the International Cooperation Administration, hereinafter called I.C.A., it has the right to recover freight payments made by it on government-financed I.C.A. grain shipments to the extent the shipping rates charged by Bloomfield for such shipments exceeded rates for comparable service charged commercial shippers.[1]

During the years 1958 and 1959, numerous parcel shipments, i.e., less than full shiploads, of bulk grain were

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[1] Throughout this Memorandum Opinion and Order, reference will be made to various "rates," such as American-flag commercial rates, foreign-flag commercial rates, prevailing rates, market rates, etc. As used by the Court and, in the opinion of the Court, as used in the various committee hearings and reports cited and in the testimony before the Court, references to "rates," unless otherwise indicated by reference to particular, negotiated, ascertainable shipping charges, are not to any given set of published rates, but rather to the range and structure of shipping rates for the entire ocean freight market or for the part thereof indicated, which may and do vary greatly over short periods of time and which are in general incapable of precise delimination. The terms are useful in the abstract for comparison purposes but delineate no concrete or easily ascertainable dollar figures.

transported aboard Bloomfield vessels from United States Gulf ports to ports of Northern Europe. Those shipments have been classified as either commercial or government-financed.

The commercial shipments were of grain which was privately contracted for and shipped in accordance with normal commercial practices by individual private shippers. Freight rates on such shipments were arrived at by negotiation either in Germany or in the United States between agents representing the shipper or consignee and agents representing the ship. These negotiations culminated in fixtures or agreements as to the terms of shipment, and were reduced to writings, called booking notes, which were signed by the negotiators.

Each shipment classified as government-financed was paid for by United States government funds and shipped aboard a United States-flag vessel to comply with the provisions of the Cargo Preference Act, 46 U.S.C.A. §1241. The relevant portion of that Act, the meaning and effect of which are very much at issue in this action, provides that on government-financed shipments such as those involved here

> the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage . . . which may be transported on ocean vessels *shall be transported on privately owned United States-flag commercial vessels,* to the extent such vessels are available *at fair and reasonable rates for United States-flag commercial vessels,* in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas. . . . (Emphasis supplied.)

Shipping terms for each of the government-financed shipments were negotiated in Germany between Maritime Cargo Agency G.m.b.H., Hamburg, as agents to States Marine Corp. of Delaware, agents for Bloomfield Steamship Co., and Frachten-Treuhand G.m.b.H., Hamburg, as agents for the various German importers. Just as in the case of the commercial shipments, these negotiations culminated in fixtures, or agreements to terms, which were reduced to writing, as booking notes, and signed by the negotiators. Typical booking notes covering government-financed shipments contained a provision purporting to subject those notes to I.C.A. rules and regulations. Bills of lading issued at loading contained similar provisions. I.C.A. regulations provided, *inter alia,* that

> the rate charged by a supplier of ocean transportation services shall not exceed the prevailing rate for similar freight contracts nor the rate paid to the supplier for similar ocean transportation services by other customers similarly situated. 22 C.F.R. §201.7.

The rates for neither commercial nor government-financed shipments were subject to shipping conference agreements, but in each and every case were separately negotiated.

Following loading of each of the government-financed shipments, States Marine Corp. of Delaware, as agents for Bloomfield, submitted invoices to Glaessel Shipping Corp., agent for the cargo, for the amount of the freight due. Submitted with each such invoice were executed copies of Form ICA-280. That form, called a supplier's certificate, was for use by I.C.A., and is promulgated by I.C.A. regulations at 22 C.F.R. §210.18(d). Among its standard printed provisions was the following:

(9) If the supplier furnishes only a service, he . . . certifies that the rate indicated on the reverse, of this form for the service rendered does not exceed the prevailing rate, if any, for similar services or the rate paid to the supplier for similar services by other customers similarly situated.

The parties stipulated at length to data extracted from 192 ocean bills of lading covering parcel shipments of bulk grain transported during the years 1958 and 1959 between United States Gulf ports and ports of Northern Europe aboard Bloomfield vessels. These stipulations clearly show that the rates for government-financed shipments were substantially higher in all cases than the rates for commercial shipments during the same time periods. The government considers the rates for commercial shipments to have been the "prevailing rates," or the rates paid for similar services by other customers similarly situated within the purview of the next above quoted I.C.A. regulation and certificate I.C.A. Form 280, and the government therefore contends it has established a prima facie case for recovery against Bloomfield, on the basis that Bloomfield's certification that the rates charged on government-financed shipments did not exceed the "prevailing rate, if any, for similar services or the rate paid for similar services by other customers similarly situated" was false.

For the measure of its recovery, the government takes the amount by which freight charges on government-financed shipments exceeded what those charges would have been had each government-financed shipment been transported at the rate at which the commercial shipment nearest in point of time thereto had been shipped.

Without more, the position of the government is a compelling one. But there are problems which do not appear on the face of the government case. Those problems become clearer upon an analysis of Bloomfield's argument, of which there are several facets.[2]

Bloomfield contends that the relevant provisions of the I.C.A. regulations and of Form ICA-280 do not have the effect asserted by the government. It is Bloomfield's position that these provisions are subject to a different interpretation, but if not, that they are void as applied in this case because in derogation of the Cargo Preference

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[2] Preliminarily, Bloomfield has suggested that the government has no standing to sue for these amounts because under the applicable international agreement the Federal Republic of Germany paid for that portion of these transportation costs on United States-flag vessels which equaled the freight rates which would have been charged had these grain parcels been shipped on German-flag ships. Thus, Bloomfield contends that the government has not properly established by pleadings and proof the extent of its alleged injury, because it has not attempted to establish what part of the alleged overcharges was borne solely by the United States government. Since the evidence and argument of counsel tends to establish that foreign-flag rates were even lower than United States-flag commercial rates, the Court believes it may be inferred that the amounts by which Bloomfield's rates are here alleged to have exceeded the United States-flag commercial rates were solely borne by the United States government. But even if that were not the case, paragraph 1 of the supplier's certificate, Form ICA-280, should settle any problem in favor of the government's standing to sue. It provides:

> "The supplier is entitled under said contract to the payment of the sum claimed and he will promptly make appropriate refund to ICA upon request of the Director in the event of his non-performance, in whole or in part, under said contract, **or for any breach by him of the terms of this certificate.**" (Emphasis supplied.)

Bloomfield's agent signed supplier's certificates for each shipment, and the government here seeks recovery for an alleged breach of those certificates.

Act, which Bloomfield sees as having been passed to aid United States-flag vessels with full knowledge and expectation that "fair and reasonable" rates for shipments thereunder might easily exceed regular commercial rates. No reported cases have interpreted either the statutory or regulatory provisions involved, and the case is therefore one of first impression.

Bloomfield views its rates separately negotiated for each of the government-financed shipments as having been fair and reasonable for United States-flag vessels in this trade. It is the contention of Bloomfield that the rates were at the time the prevailing rates for such trade, no greater than those charged by other United States-flag vessels for similar services performed for parties shipping government grain cargoes aboard United States-flag vessels pursuant to the requirements of the Cargo Preference Act. Thus, Bloomfield contends that its rates neither exceeded the prevailing rates nor those paid to it by other customers similarly situated, if by "other customers similarly situated" is meant, as Bloomfield thinks should be the case, other shippers who are similarly bound by the Cargo Preference Act provisions. It is Bloomfield's position that such an interpretation of those provisions is the only one which will coincide with the congressional intent embodied in the Cargo Preference Act.

Bloomfield further contends that if the provisions of the form and regulation are interpreted as required here by the government to compel a United States-flag carrier to carry government-financed cargoes shipped on its United States-flag vessels at rates the carrier might be forced by foreign-flag competition to charge commercial shippers

which are free to use foreign-flag vessels exclusively, then such provisions are null and void as so applied because they are contrary to the statutory purpose.

Bloomfield's final contention is that in equity the government should not be permitted to recover because the agencies concerned with these matters had full and prior knowledge that different rates had been and would be charged for I.C.A. as distinguished from commercial cargoes, and with such knowledge agreed to the terms of each shipment and paid the rates agreed upon.

Both parties agree that the provisions of the Cargo Preference Act apply to the government-financed shipments involved here. And although the applicable provisions, quoted above, of Form ICA-280 and the I.C.A. regulations are both apparently of broad application and indicate no recognition of the special obligation imposed on I.C.A. and other government agencies by the Act, the government contends that those provisions correctly mirror the intent expressed in the Act. It is well settled, of course, that an administrative rule or regulation which operates to create a rule out of harmony with the will of Congress as expressed by the statute is a mere nullity.[3] Therefore, vital

[3] Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936). These particular regulations, including that promulgating Form ICA-280, were authorized during the pertinent period, 1958 and 1959, by provisions of the Mutual Security Act of 1954, sec. 526, 68 Stat. 856 (1954). The Mutual Security Act, passed almost simultaneously with the Cargo Preference Act, originally contained a provision which, although limited to shipments under Mutual Security Act programs, was almost identical to that of the Cargo Preference Act, and properly considered in part materia therewith so that they should be construed with reference to each other. The Mutual Security Act provision, sec. 526, 68 Stat. 853 (1954),

to a proper determination of this case is an analysis of the Cargo Preference Act and the congressional intent underlying it.

As the government views the Act, it was intended only to provide cargoes for United States flag shippers, not subsidies in the form of increased rates on government shipping. Thus, the government sees nothing in the Act which dictates that rates for shipments under the Act should be permitted to exceed United States-flag rates for regular commercial shipping. Bloomfield's interpretation of the Act, on the other hand, is that it was designed to aid United States-flag shippers who were faltering badly because of their inability to profitably compete with the foreign-flag operators, whose operating costs were much lower. Therefore, Bloomfield sees nothing incongruous in rates for shipments required by the Cargo Preference Act to be shipped on United States-flag vessels being higher than regular United States-flag commercial rates, which are of necessity greatly influenced by foreign-flag competition, so long as rates for shipments under the Act are fair and reasonable.

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was repealed in 1957 insofar as it was repetitive of the provisions of the Cargo Preference Act, 46 U.S.C.A. §1241 (b). The report of the committee of the House of Representatives which accompanied the statute repealing that portion of sec. 500 explained that "the repealed language has been supplanted by more pertinent provisions of Public Law 664, 83d Congress (46 U.S.C.A. §1241 (b)); consequently, the less pertinent is obsolete." House Report No. 778, July 8, 1957, 1957 U.S. Code Cong. & Ad. News 1479, 1480. Thus, the U.C.A. requirement extant in 1956 and 1960 must be measured not only by the then current provisions of the Mutual Security Act but also by the expression of congressional will contained in the Cargo Preference Act.

The Cargo Preference Act, 46 U.S.C.A. §1241 (b), contained the following relevant provisions when enacted as Public Law 664 in 1954:

> (b) Whenever the United States shall procure, contract for its own account, or shall furnish to or for the account of any foreign nation without reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: *Provided*, That the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver. . . .

The only portion of the Act dealing with freight rates is the limiting provision, "to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels." The Act neither defines "fair and reasonable rates" nor specifies how they shall be determined. But, fortunately, there are numerous Congressional reports to which we may turn for aid.

The Committee on Merchant Marine and Fisheries of the House of Representatives, in its report which accompanied the bill, explained that:

> The purpose of the bill is to implement the policy . . . that the United States should have a merchant marine sufficient to carry a substantial portion of its waterborne export and import foreign commerce. The higher American standard of living with the resultant higher operating costs to the American shipowner has made competition with low-cost foreign ships difficult, with the result that the proportion of cargoes carried in American bottoms has been constantly declining. From time to time there has been inserted in various foreign-aids bills a provision that at least half of the shipments be made in American-flag ships. The present bill serves to establish that principle on a permanent basis. H.R. Rep. No. 2329, 83d Cong., 2d Sess. 1 (1954).

The report of the Committee on Interstate and Foreign Commerce of the Senate also accompanied the bill and contained expressions similar to those of the House report. The Senate report spoke of the "pitifully inactive" United States merchant marine and of the fact that government procurement practices often bypassed American shipping "with an eye to lower costs of transportation in foreign bottoms rather than to the policy of cargo preference to American shipping."

Subsequent to the passage of the bill, as a result of public criticism of the Act and its administration, the House Committee on Merchant Marine and Fisheries held additional hearings. The critics of the Act were complaining that a shortage of United States-flag ships was hindering the

administration's program of selling farm surpluses overseas because at least 50 per cent. of those shipments were required by the Act to be made on United States-flag ships. It was also noted with disapproval by critics that a shortage of United States-flag vessels "was resulting in demands for exorbitant freight rates by available American shipping."

At the conclusion of its hearings the House committee issued a lengthy report. It began with a review of the background of the Act and the factors which necessitated its passage, emphasizing that rate competition from low-operating-cost foreign shipping would have been irreparably detrimental to the American merchant marine in the absence of the protection afforded by the Act.[4]

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[4] "Subsequent to World War II the merchant fleets of the world were returned to private operation, and restored . . . to approximately prewar size, long before any substantial revival of normal trade.

"During this period ocean shipping requirements, particularly to the devastated countries of Europe and the Middle East remained at a very high level with the great bulk of cargoes going from the United States for the urgently needed relief and rehabilitation of those areas. Early in this period it became apparent that normal commercial shipping practices were inconsistent with the abnormal foreign-aid programs. Without some form of assurance of participation by United States-flag vessels in the transportation of relief and aid cargoes, it became clear that the shipping of the recipient and other maritime nations with lower operating costs would be able to underbid American-flag vessels and eventually transport much, if not all, of these cargoes to the irreparable detriment of the American merchant marine . . . "Thus, as it became evident that substantial foreign-aid programs would comprise the bulk or great portion of our foreign trade for an indeterminate time to come the Foreign Assistance Act of 1948 . . . provided . . . that no less than 50 percent of goods procured in the United States out of funds made available out of that act should be transported on American Flag ships. The

Testimony was taken from representatives of the Department of Agriculture, the Foreign Operation Administration, the General Services Administration, the Federal Maritime Administration, the American-flag tramp shipping industry, the Conference of American Maritime Unions, and the major steamship associations. The main questions about which the committee's inquiry revolved were the alleged unavailability of American tonnage and its effect on ocean freight rates, the adequacy of the administration of the Act, and whether or not corrective action was necessary.[5]

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same or similar provisions, reflecting our national maritime policies with regard to the carriage of a substantial portion of our export and import foreign commerce have been incorporated in every major relief or foreign aid enactment since 1948 . . .

"In view of the history which preceded Public Law 664 and the continued unsettled conditions throughout the world, the Congress determined, by the enactment of the permanent Cargo Preference Act, to state our shipping policy in the clearest and most unequivocal terms for application in all cases where normal channels of international trade are disrupted by virtue of United States Government-controlled programs financed by Federal funds in whatever form they may take." H.R. Rep. No. 80, 84th Cong., 1st Sess. 3-4 (1955).

[5] The position of the Department of Agriculture was explained by numerous of its officials. The Department's Assistant Secretary explained by letter that ocean transportation arrangements under its Public Law 480 programs through which grain was being shipped to Yugoslavia were being made by the Yugoslavian government, subject to the approval of the Department of Agriculture. As of the date of the letter, February 4, 1955, all such arrangements had been approved. It was however, pointed out that in the course of approving transportation, a steady increase in United States-flag rates had been observed. With negotiation of some rates and rejection of others the Department had approved fixtures on shipments fron the Gulf to Yugoslavia at rates ranging from $16.25 per ton in January 1955 to $17.15 per ton in February 1955. The Assistant Secretary testified that in October 1954 the Depart-

After reviewing the testimony the committee set forth

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ment could reasonably have expected to fix vessels at rates from $12.50 to $13.60 per ton at United States Gulf ports.

Testimony of other officials of the Department of Agriculture, including the Director of Transportation and Warehousing Division and the Chief of the Ocean Transportation Section, Commodities Stabilization Service, was received. This testimony confirmed that ocean transportation was arranged through the Yugoslavian merchant marine mission:

> "The mission works through its own brokers who scan the market for the best offers which are relayed through the mission to the Department of Agriculture for approval or rejection, if it appears that an offer is in excess of what the market appears to be for that day. Fixtures are made directly by the Yugoslavian Government representatives upon approval by the Department. This procedure is followed with respect to requirements for the entire program including arrangements for liner shipments in parcel lots." H.R. Rep. No. 80, 84th Cong., 1st Sess. 7 (1955).

These witnesses admitted that the Department neither had the information nor was in a position to establish a fair and reasonable rate within the meaning of the law, and that in an effort to overcome the difficulty of establishing a fair and reasonable rate the Department had adopted as a ceiling the rate set by the National Shipping Authority in 1951. The Department's representatives also conceded that dumping of large amounts of cargo on the market in a short time would have the effect of pushing the rates up. It was reported, with reference to an announcement by the Yugoslav mission that a canvass of the market on February 3, 1955, yielded no American-flag availabilities, that eight or ten ships were available at the time but for reasons unknown were not interested in offering for the Yugoslav requirements.

Representing the Administrator of the Foreign Operations Administration was the Director of the Office of Transportation. The Foreign Operations Administration was at the time concerned with the movement of government-controlled cargoes under the Mutual Security Act of 1954, **under which the cargoes involved in this lawsuit originated.** At the time of these hearings the provision of the Mutual Security Act of 1954 similar to the Cargo Preference Act was still extant. See fn. 2. Its language referred to the availability of vessels "at market rates for United States-flag commercial vessels provided such rates are fair and reasonable." No indi-

its findings and conclusions. It was felt that the Act was

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cation is given of what "market rates" were considered to be, but in answer to an interrogatory concerning the failure at times to get bids from United States-flag vessels, "the Director of Transportation stated that the failure . . . was due to the absence of any indication on the part of the appropriate agencies of Government as to what a fair and reasonable rate is, and agreed that in view of the volume of the FOA program coupled with the agricultural program when we only have 70 tramp ships left we are fast approaching the stage where the rates of all American-flag tonnage will rise to a level at which it will be impossible to adhere to the 50-50 provision. He stated that it was well known in December 1954 that combined programs were to be underway in January, February, and March, 1955 which would provide more cargo for the proportionate American share than United States-flag tramps could move." H.R. Rep. No. 80, 84th Cong., 1st Sess. 9 (1955). The Director added that his department recommended more use of liners, such as the Bloomfield ships involved in this case, for carriage of parcel lots of bulk commodities. Finally, he stated that although there was a general rise in freight rates the world over at the time, the American flag rate had risen more rapidly because fewer ships were available.

The representatives of the General Services Administration testified that that agency at times procured ships for the Foreign Operations Administration for the transportation of its cargoes. The procurement consisted of public advertisement for bids, receipt of sealed bids, public opening thereof, and finally submission of the bids to the Foreign Operations Administration for approval or disapproval.

> "As to the problem of determining fair and reasonable rates for United States-flag commercial vessels GSA has made a practice of making its own computations on the basis of cost of operation and then checked them with the Maritime Administration to determine whether or not the rates were reasonable. Experience has shown that the comparative computations have closely approximated each other. The GSA witness testified that in his opinion the Maritime Administration is the appropriate agency to set the pattern and guide for the determination of fair and reasonable rates." H.R. Rep. No. 80, 84th Cong. 1st Sess. 10 (1955).

The Federal Maritime Administration was represented by the Administrator and the Director, National Shipping Authority.

plagued by a lack of coordination among the agencies involved.[6] It was also concluded that the Act did not make

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"Testimony developed that while Public Law 664 places a responsibility for compliance with the law upon each administering agency, . . . the Maritime Administration has certain broad responsibilities with regard to its operaton. Pursuant to these responsibilities Maritime Administration in recent months has offered the several administrating agencies such information or assistance as they might be able to render . . . Maritime does not conceive that it is charged with the duty of determining fair and reasonable rates, but has furnished guidance on the subject when requested by other agencies." H.R. Rep. No. 80, 84th Cong., 1st Sess. 10-11 (1955).

Concerning the alleged unavailability of United States-flag ships at various times

"it was suggested that in that situation owners might have preferred not to bid for that particular business because of the prospect of other business more immediately available in an area closer to the position of their vessels . . . It was stated, however, that there have been instances coming to the attention of NSA where American-flag vessels have been offered at rates which the shipping agencies of the Government believed to be too high for the purpose and were therefore rejected." H.R. Rep. No. 80, 84th Cong., 1st Sess. 11 (1955).

It was testified that the

"former NSA rates were established by determining as far as possible the approximate average costs of private operation of American-flag, Liberty-type vessels, together with consideration of the cost of Government-operated vessels plus a fair and reasonable maximum level of elements normally incident to private operation such as depreciation, insurance, and profit." H.R. Rep. No. 80, 84th Cong., 1st Sess. 11 (1955).

The Maritime Administrator commented that if there should be a shortage of American-flag vessels for a period no serious problem was posed since the contracting agencies might then go into the foreign market upon making the determination that American shipping was not available at fair and reasonable rates.

[6] "If any one fact stood out from all the testimony adduced at the hearings, it was the lack of coordination among the several agencies charged with the administration of the transportation aspects of the foreign-aid programs. For the most part, the departments had little or no information as to the

clear where responsibility for its administration rested, although it implied that determinations should be made from time to time that privately owned United States-flag commercial vessels were available at fair and reasonable rates for United States-flag commercial vessels. The committee noted that there was no concurrence on the question how fair and reasonable rates should be calculated, and gave its own construction of the Act.[7] It is very clear

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cargoes planned for shipment by other departments. Consequently, no attempt has been made to space the offerings so as not to unduly increase the freight rates at any one time. No effort has been made to obtain the rate concessions inherent in consecutive voyage charters. And the procedures by which the charters are arranged not only are not uniform among the departments, but are inefficient, uneconomical, and in some cases, represent a lack of good judgment." H.R. Rep. No. 80, 84th Cong., 1st Sess. 16 (1955).

[7] "The alternatives seemed to be (a) market rates, or (b) rates based upon operating cost-plus reasonable profit. The committee referred this question to the Comptroller General of the United States . . . .

"In sum, the Comptroller General advises that the term 'would appear to call for reasonable compensation to the operator, including a fair profit.' Certain legislative history is cited as support for that view. He adds: 'However, it seems apparent that the statute contemplates average "fair and reasonable rates," which may or may not be profitable or even compensatory, to a high-cost operator.'

"The committee agrees with the Comptroller General's construction of the law. It must be clearly recognized, however, that the term has reference to a range of rates beyond which it is legally permissible to ship Government cargoes in foreign-flag vessels without regard to the 50 percent limitation. Also, it should be understood that at any one particular time market rates may be considerably less than this ceiling, in which event the chartering agency should feel free to exercise sound business judgment to secure the lowest rates possible for the Government. If every charter offered at or below the ceiling had to be accepted legally, it takes no great amount of foresight to realize that freight rates for United States-flag vessels

that the committee did not consider market rates to be reliable indicia of fair and reasonable rates, and saw the problem of determining fairness and reasonableness as one which was not simple. It was the committee's view that the Act could not have caused delay in shipments of surplus agricultural commodities unless it had been improperly administered.[8]

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would remain at the ceiling. The government must be in a position to take advantage of the pendulum of supply and demand when it swings in its direction." H.R. Rep. No. 80, 84th Cong., 1st Sess. 18 (1955).

[8] "The act provides that whenever the United States is directly a party to programs for the acquisition or disposition of equipment, materials, or commodities, involving ocean transportation, including the advancement of 'funds or credits or guarantee the convertibility of foreign currencies' in connection with the furnishing thereof 'the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 percent of the gross tonnage of such equipment, materials or commodities . . . shall be transported on commercial vessels, to the extent such vessels are available at fair and reasonable rates for the United States-flag commercial vessels, in such a manner as will insure a fair and reasonable participation of United States-flag commercial vessels by geographic areas . . .'

"Thus, the 50-percent limitation only applies when United States-flag commercial vessels are available at fair and reasonable rates for such vessels. The minute the determination is made that no United States-flag vessels are available on fair terms, the Government agency charged with shipping the cargo is free to engage foreign-flag vessels without regard to the limitation. The only delay that could ensue would be attributable to the administrative action in determining availability.

"Representatives of the Department of Agriculture readily admitted to some uncertainty in administering the provisions of the Cargo Preference Act in connection with activities under Public Law 480. They stated they did not know what constituted the outside limits of fair and reasonable rates for United States-flag commercial vessels and thus were reluctant to go into the foreign-flag vessel market on the basis of a lack of availability of United States-flag ships." H.R. Rep. No. 80, 84th Cong., 1st Sess. 19 (1955).

The report was concluded with certain recommendations, among them that governing agencies should discontinue the practice of permitting representatives of foreign governments to arrange for shipments of cargoes subject to the limitations of the Act, that more ultilization should be made of liner services, and that procedures should be established under which each of the agencies administering programs under the Act would exchange information and coordinate their activities for a more effective administration of the Act.

One year later the same House committee felt that additional hearings were required in view of continued attacks upon the operation of the Act. One of the primary criticisms was that the Act created an indirect subsidy in favor of the American merchant marine at the expense of the farm commodities disposal program because, on shipments required by the Act to be made on United States-flag vessels, the amounts by which the United States-flag rates exceeded foreign-flag rates had to be paid out of appropriations for the commodities program. Once again the committee took extensive testimony and issued a lengthy report.

Beginning with a warning about peacetime public apathy toward the merchant marine,[9] the report summarized the

[9] "The real problem lies in public apathy toward the merchant marine in time of peace. For some reason difficult to understand, the tendency in the past has been to treat the merchant marine as merely another segment of the American economy—an industry which should succeed in competition with its foreign counterparts or fade into the doldrums until the outbreak of another emergency." H.R. Rep. No. 1818, 84th Cong., 2d Sess. 2 (1956).

testimony that had been adduced and set forth the committee's conclusions and recommendations. It was the committee's determination that the Cargo Preference Act caused no serious detriment to government agricultural surplus disposal programs, and once again the extreme necessity of the Act for protection of the American merchant marine was emphasized.[10] In answer to the argument that

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[10] "Is the cargo-preference law essential to the American merchant marine?

"Definitely yes. The fact is that no member of the committee, informed as they are with respect to maritime matters, realized prior to the hearings just concluded how vitally necessary the Cargo Preference Act is to the American merchant marine.

"There are today a little over 1,000 ships in the active operating American merchant marine. Even the most conservative estimates from defense experts place this figure as representing a deficiency of several hundred vessels from what would be needed immediately upon the outbreak of a new war. Moreover, today the American merchant marine is carrying about 28 percent of the waterborne commerce of the United States. In exports alone, where the aid cargoes are assured to United States-flag ships by force of the 50-50 law, some statistics showed we are carrying only 18 percent overall and the foreigners the remaining 82 percent.

* * * * *

". . . Every competent maritime authority has stated that repeal of the cargo-preference law would result in the immediate demise of the entire American tramp fleet. The facts support this inasmuch as 78.5 percent of the business of American tramps during 1955 involved aid cargo. It is somewhat unusual that they were able to secure the remaining 21.5 percent on a purely commercial basis. The only explanation is that they happened to have vessels in the right places at the right times.

"Aid cargoes accounted for 19.4 percent of American-flag liner carryings. If the 50-50 law were repealed, there is no reason to expect that the liners would be able to obtain any greater percentage of Government-sponsored cargo than in the case of their existing carryings of commercial cargo. The impact upon their financial condition which the loss of this

the directly subsidized United States-flag liner fleet, of which Bloomfield's vessels are a part, should, in the absence of the Act, be able to compete profitably with foreign-flag operators on both commercial and government-sponsored shipments, the committee explained that there were many factors other than higher operating costs which place the United States-flag liners at a competitive disadvantage.[11] Not the least of those factors was the shortage

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business would entail could well mean the demise also of some of the marginal companies in the industry. It would also reduce the profit of even the most successful companies so seriously as to jeopardize the rebuilding program now just getting underway. Indeed, some companies might be so discouraged with the future prospects of the industry as voluntarily to abandon plans to replace their existing fleets." H.R. Rep. No. 1616, 84th Cong., 2d Sess. 3-4 (1956).

"It has been suggested, however, that the American-flag liner fleet should compete on equal basis for all cargo, both commercial and government-sponsored, and that the direct subsidy received by that segment should make such competition possible. The committee inquired into that phase of the problem specifically. It requested testimony from traffic men doing business on all three coasts of the United States and the direct question was put to them. Why can't you compete on

direct question was put to them: Why can't you compete on equal basis with the foreign liners without the aid of 50-50?

"The answer lies in a combination of factors each detrimental to American-flag shipping. One reason is that the nationals of other countries prefer to ship under their own flag and take steps to see that this is done. Shippers in this country do not have the same preference or at least do not have the bargaining power necessary to accomplish the result. There is, of course, the dollar exchange problem which provides added impulse to the foreign exporter or importer. He is in a position where he must conserve dollars.

"Another cause is traceable direct to the foreign governments themselves . . . Whenever the opportunity presents itself, these governments direct or instruct that the cargo be shipped in vessels of its own flag. Unfortunately, those in charge of directing shipping for United States Government

of American dollars available to foreig shippers for freight payments.

Then, in 1961, after the occurrence of the alleged overcharges involved in this lawsuit, the Senate Committee on Commerce issued a report which accompanied a successful bill to amend the Cargo Preference Act. The language of that report indicates that congressional policy remained unchanged. The amendment was for the purpose of aiding American-built shipping and preventing foreign-built ships from obtaining American registry in order to take advantage of cargoes under the Act. The language would appear to give at least tacit recognition of the fact that higher rates on those government-sponsored cargoes restricted by the Act to American shipping meant that at that time of depressed foreign shipping markets ships could be more profitably operated under American registry.[12]

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cargoes are not governed by the same specific legislation in effect cargo preference policy. If they were sponsored cargoes might not be necessary rence for Government-84th Cong., 2d Sess. 27 (1956). y." H.R. Rep. No. 1818,

[12] "It has long been national policy to encourage the development and maintenance of an American-owned and American-built merchant marine manned by American citizen personnel. One of the means to this end has been the provision, first incorporated in the various foreign assistance statutes and, in 1954, made permanent by the enactment of Public Law 664—known as the 50-50 statute—that at least 50 percent of Government aid and Government-financed cargoes must be carried in U.S.-flag commercial vessels. Now, however, there is only a limited amount of these 50-50 cargoes, and an oversupply of available U.S.-flag vessels in relation to the volume of cargoes to be moved. The result is an unhealthy shipping market, which has discouraged new unsubsidized vessel construction for U.S. registry.

"In the past few years an increasing number of foreign-flag vessels and vessels built or rebuilt in foreign shipyards have

Thus, the Act is accompanied by a rich legislative history which shows great congressional concern for the American merchant marine. Notably, there is no indication that the Congress intended that shipping rates under the Act should be limited to American-flag commercial rates. In fact, a reading of the statute's history loudly rebuts that theory. Only a complete discarding of the elementary supply-demand principle of price determination would allow one to argue that rates on government-financed shipments limited by the Act to United States-flag vessels should normally remain the same as American-flag rates on commercial shipments for which lower cost-lower rate foreign shipping was also available. In the absence of any statutory provision setting American-flag commercial rates as ceilings, it is my conclusion that Congress did not intend the Act to have such an effect, either per se or through agency interpretation such as the I.C.A. regulation and certificate provisions here relied upon by the government.

That Congress intended a more realistic and flexible ceiling for rates on shipments under the Act is wholly reasonable. It cannot reasonably be said that Congress intended American-flag commercial rates to be used, because that would have seriously endangered the congressional purpose in passing the Act. Testimony before the House committee indicated that commercial ocean freight rates, American

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been documented under American registry. The purpose, or at least one purpose, of so registering was to qualify their vessels for participation as as American-flag ships under section 901 (b), and thus to permit them to carry these cargoes restricted by law to American-flag vessels. Foreign shipping markets have been quiet, and the ships in question could more profitably be operated under the U.S. registry because of these 50-50 cargoes, so they have been transferred to American registry. No duty is paid on such foreign-built or foreign-rebuilt ships." S.Rep. No. 667, 87th Cong., 1st Sess. 2 (1961).

and foreign, were subject to great fluctuation, partially because of the disruptive effects of the dumping of aid cargoes on the market by American government agencies. Such testimony further indicated that without the ceiling on freight rates provided by the "fair and reasonable" provision of the Act, both American and foreign rates could have gone much higher in periods of great shipping activity, while in periods of diminished activity and therefore much lower foreign rates, American vessels, especially tramps, would in some cases have been unable to operate at rates competitive with foreign shipping, even with cargo to haul.

Congress adopted as its standard "fair and reasonable" rates and the Court finds the pertinent question here to be, how are such rates to be determined? Once again, the Act's legislative history is helpful. All of the agencies involved have grappled with the question what is meant by "fair and reasonable." Each of them, at one time or another, confessed lack of adequate information and expertise to make appropriate determinations because of the numerous intangibles involved, but it is clear that none of the agencies interpreted the Act to require, or allow, the use of American-flag commercial rates as standard. The House Merchant Marine Committee, after considering testimony from the agencies, gave its own construction of the Act. That construction rejected the use of such market rates as the standard, and called for ceiling rates which would provide reasonable compensation, including a fair profit, to the average operator.[18] In fact, in its review of the committee

[18] See footnote 6.

reports and of the testimony presented in this case both by the government and by Bloomfield, the Court has found no evidence that anyone considered American-flag commercial market rates to be the measure of "fair and reasonable" rates under the Act in 1958 and 1959, or at any other time.[14] In fact, all the evidence has been to the contrary.

It is undisputed that the various agencies have established separate departments staffed with specialists in ocean transportation who have kept daily, even hourly, track of the ocean freight markets, collating information received through government and commercial channels and from all the private trade publications, in quest of the elusive "fair and reasonable" rate. The government's contention as represented by the evidence offered by it, that the determination of whether rates on the Bloomfield shipments under the Act are fair and reasonable involves *only* a simple comparison of those rates with Bloomfield's rates on commercial shipments of similar grains nearest in point of time, is weakly supported. The Court finds that such a comparison is not only inadequate to test the fairness and reasonableness of the rates charged by Bloomfield, it would impose as the sole criterion for such determination a test which was considered by the House Merchant Marine Com-

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[14] Only in the 1962 report of the Antitrust Subcommittee of the House Committee on the Judiciary H.R. Rep. No. 1419, 87th Cong., 2d Sess. 280-284 (1962), obviously the genesis of the dispute being litigated here, does the Court find an instance where rates on government-financed shipments were attempted to be measured by commercial rates. A portion of that report critically commented that Bloomfield's rates on these shipments exceeded its own contemporaneous commercial rates but gave no recognition to the fact that the Cargo Preference Act applied on these shipments, or that there were grossly different factors involved in the two rate determinations. The report is silent as to the consideration, if any given those factors.

mittee in critical review of the Act after its passage, and by the Comptroller General at the Committee's request, and which was rejected by both.[15]

Thus, if the I.C.A. regulations upon which the government relies must be interpreted to require rates on government-financed shipments under the Act to be measured by rates on purely commercial shipments of similar grains on American-flag vessels to the same or nearby points, then those regulations are void as so applied because they are contrary to the statutory purpose of the Cargo Preference Act and, accordingly, the government would not be entitled to recover its claim against Bloomfield, and the Court so finds and concludes in the event it should be in error as to the primary grounds of this decision which follows. But it is not necessary to hold such regulations void in order to determine this dispute. The regulations are sufficiently ambiguous when applied to the facts of this case that, reconciling any doubt in favor of their compliance with the statute, Bloomfield may be considered to have complied with them if it be correct in its contention that its rates charged for government-financed shipments are within the purview of the Act.

Since American-flag commercial rates are in appropriate standards by which to measure the fairness and reasonableness of Bloomfield's rates, what other criteria may be used? How are we to determine whether Bloomfield's rates were or were not fair and reasonable? A somewhat detailed analysis of the testimony concerning the negotiation of these rates will be helpful.

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[15] See footnote 6.

Both parties propounded certain interrogatories to Thomas F. Dunn principal owner and manager of the Maritime Cargo Agency G.m.b.H. Hamburg, Germany, in 1958 and 1959. At that time Maritime Cargo Agency G.m.b.H. were European freight agents for States Marine Lines of New York, Bloomfield's agents. Maritime Cargo Agency G.m.b.H. therefore acted in 1958 and 1959 as broker for Bloomfield in the German trade. Dunn, in his capacities with that agency, supervised the negotiation of shipping terms for Bloomfield grain shipments to Germany, both commercial and government-financed, personally handling most of the negotiations. These negotiations were conducted with representatives of Frachten-Treuhand G.m.b.H., Hamburg, who were the chartering agents for various German grain importers.

Each parcel of grain was dealt with separately, and the rate for each parcel, whether of commercial or government-sponsored grain, was separately negotiated in each instance. When Dunn and Frachten-Treuhand would, after extensive negotiation, come to terms on a given shipment, the proposed arrangement would be submitted to the principals of each for confirmation. After that confirmation had been received, Dunn prepared the booking note, signed it, and presented it to Frachten-Treuhand for signature, after which it was returned to Dunn. Notably, Dunn testified that

> the only difference between the way we negotiated shipment of ICA parcels and commercial parcels was that Frachten-Treuhand told me that for ICA parcels, in addition to telling me that the German charterers must approve the agreement, ICA must also approve. Usually Frachten-Treuhand told me ICA had approved a day or two later after I had been told the charterer

> appproved . . . Shipper approval was obtained in order to insure that the grain berth would be available during the period of booking and we understood ICA approval was obtained as regards the rate. Answer to Interrogatories 18 and 33.

In no instance was a booking note prepared by Dunn prior to confirmation by the principals and, on I.C.A. shipments, receipt of notice from Frachten-Treuhand that I.C.A. approval had been obtained. Dunn was not told by Frachten-Treuhand who actually gave the I.C.A. approval, but it was his understanding that the approval was communicated to Frachten-Treuhand by the German Ministry of Transport, in Bonn. Dunn assumed that the German Ministry obtained approval from I.C.A. officials in Washington.

When asked by the government why booking notes prepared for government-financed shipments contained a clause purporting to subject them to I.C.A. regulations, Dunn answered that in the first such transaction with Frachten-Treuhand the confirmation of the terms of the booking received from Frachten-Treuhand included a sentence stating they required such a clause to be inserted in the booking note.

Dunn's testimony gives an extremely helpful insight into the rate differential between commercial and government-financed shipments. Dunn first learned from Frachten-Treuhand that parcels of I.C.A. grain would move from Gulf ports to Germany, and was asked whether space was available and what his rate would be. After consulting with his principals, Dunn quoted $14.50 to $15.00 per long ton, based on recent fixtures by American-flag vessels at $16.00 to Trieste and $16.50 to Rijeka. After considerable nego-

tiation he and Frachten-Treuhand agreed on a rate for the first I.C.A. shipment, in early May 1958, of $13.50 per long ton, subject to shipper and I.C.A. approval, which was obtained. Dunn testified that at all times in 1958 and 1959 he and Frachten-Treuhand negotiated the I.C.A. shipment rates as nearly as possible to coincide with rates charged by other American-flag liners in similar trade. Dunn understood that Frachten-Treuhand would not agree to a proposed rate unless it was no higher than that of other American-flag vessels in the trade. Dunn was not familiar with I.C.A. regulations, except that he knew that I.C.A. grain was required to be shipped in part in American-flag vessels and at rates no higher than other American-flag vessel rates.

In explanation why rates on commercial shipments were lower than those for I.C.A. shipments, Dunn stated that since commercial parcels did not have to be shipped on American-flag vessels the rates offered for them had to be the same or about the same as rates of competing foreign-flag vessels. Furthermore, Dunn was led by Frachten-Treuhand to believe that in return for being given the I.C.A. grain shipments he would be expected to provide space for commercial shipments at foreign-flag rates, which were perhaps not compensatory, at any time that Frachten-Treuhand was unable to obtain space on foreign-flag vessels because of their being either out of position or fully booked.

Having presented a view of the negotiations in Europe through the Dunn interrogatories, Bloomfield brought forward the deposition testimony of Arthur S. Mason, who in 1958 and 1959 had been Chief of the Ocean Transportation Branch of the Department of Agriculture. At the time his

deposition was taken Mason had retired from government service. He had no interest in the outcome of this litigation.

Mason had worked in the Department of Agriculture about forty years, much of which time he spent in the area of ocean shipping of agricultural products. He had retired in 1956, after having served four or five years as Assistant to the Director of Transportation, in which capacity he had been in charge of certain I.C.A. shipments, negotiating liner fixtures and charters. In the early part of 1958 he was asked by the Department to return to work and to assume the duties of Chief of the Ocean Transportation Branch, in which position he had the responsibility of seeing that the Cargo Preference Act was complied with on the various programs assigned to his Branch.

From the time of the passage of the Act through 1958 and 1959, when the rates alleged here to have been excessive were levied, there was a good deal of interagency discussion in the search for appropriate rate ceilings. Because of its extensive overseas surplus commodities disposal programs, the Department of Agriculture, or rather its Ocean Transportation Branch, developed a particular expertise in the determination whether ocean freight rates on government-financed shipments were fair and reasonable. Other agencies, including I.C.A., often sought the advice of personnel in that Branch.

On numerous I.C.A. programs, Mason and his staff actually negotiated transportation agreements as agents for I.C.A. However, on the shipments to Germany involved in this case, Mason testified that a different procedure was followed. Germany had been one of those maritime nations which had strenuously objected to the Cargo Preference

Act, and because of its objection had been allowed by the State Department and I.C.A. to make its own fixtures, so long as rates were subject to prior approval.

When Mason became Chief in early 1958, he found a $13.50 rate on government-financed wheat shipments from the Gulf to Germany, which he thought was too high. He inquired who in his office had approved that rate, but no one had the information. He was however, informed by an I.C.A. official that someone in I.C.A. had approved the rate. It is interesting to note that this is the same rate levied by Bloomfield on its first I.C.A. shipment, in early 1958. Shortly thereafter Bloomfield's rates on these shipments dropped to $12.50 for a short while and then steadied at about $10.50 per ton. Mason explained that he refused to approve any more $13.50 rates, and that the Germans then negotiated directly to I.C.A. and obtained approval of a $12.50 rate. This rate was also unsatisfactory to Mason, and he had an agreement with I.C.A. that thereafter he, Mason, would be given complete authority over the determination of the rates to be approved and that the Germans would deal with him directly. He then fixed a $10.50 rate, which he approved as fair and reasonable based on the grain market at that time. He insisted that the Germans refer to him for approval all fixtures before shipments were made.

On all except the very first Bloomfield shipments, Mason testified that he personally had given approval of the rates as fair and reasonable. He was not aware who had actually made the fixtures, although he knew they were made in Hamburg by someone with authority to do so. Mason explained that because of the fast-moving nature of the work, his approval was usually given by phone to someone in the

German Mission, and that he kept I.C.A. informed of his approvals, also by phone. Mason also related that the steamship companies normally submitted their invoices to the Germans, as done here by Bloomfield. Although he was aware that Bloomfield vessels were involved Mason never communicated his approval of rates to Bloomfield; an agent of the Germans would communicate with Bloomfield's agents.

When asked about rates that were being charged in 1958 and 1959 for carriage of commercial grains on American-flag vessels, Mason explained that there was actually very little such grain carried on American-flag ships. Those rates were not considered in his setting of rate ceilings under the Cargo Preference Act, which were based on costs of operation. Mason said that American shippers often took commercial shipments at less than the cost of operations, because filler cargoes were needed and because low rate cargoes were often accepted as part of a package which included a higher rate cargo on which the rate might be fixed by a tariff agreement and not therefore subject to negotiation.

The government has attempted to discredit a major portion of Mason's testimony by presenting deposition testimony of various other employees of the Department of Agriculture who say the rates on these Bloomfield shipments were never presented to the Ocean Transportation Branch for approval. The Court finds, however, for reasons hereinafter indicated, that Mason's testimony is the more credible. The Court's findings here, insofar as they involve the areas testified to by Mason which are to some extent apparently in conflict with the testimony of his associates,

are predicated on his testimony as the more credible and the Court rejects theirs as the less credible.

Joseph A. Ryan succeeded Mason as Chief of the Ocean Transportation Branch. He testified, as had Mason, that his Branch dealt with ocean freight rates under the Cargo Preference Act. He affirmed that his Branch actually negotiated fixtures on some programs, and on others merely indicated rate approval. But when asked about the Bloomfield shipments, Ryan denied that his office had ever been informed of those shipments or had ever approved any of them. But upon cross-examination Ryan did admit that during 1958 and 1959 the personnel of the Branch had been available to other agencies for advice on ocean freight rates, that he had not in those eight years been familiar with every transaction in which the Branch engaged, and further that it was possible that I.C.A. had consulted with Mason or other personnel of the Branch on ocean freight rates to Germany without his knowledge.

The government also presented the deposition of Gerald L. Healey, Assistant Chief of the Ocean Transportation Branch. He had been employed, in a clearical position, in the Branch in 1958 and 1959 when Mason had been Chief. Healey testified, as did Ryan, that the rates on Bloomfield shipment had not been approved by his office. But he explained that he was not in the same office with Mason and was in no position to have overheard Mason's telephone conversations.

Finally, the government presented the deposition of Martin J. Hudtloff, Director of Transportation Services Division Department of Agriculture. Hudtloff testified that in 1958 and 1959 Mason had been in charge of the Ocean

Transportation Branch of his Division and, as such, was the person in the organization most intimately concerned with ocean freight rates. He also testified that during those years the Branch had acted as agents for I.C.A. on certain programs and were in daily communication with them. But Hudtloff flatly denied that his people were ever informed of the Bloomfield shipments to Germany, explaining upon cross-examination that he relied for that information on discussions with Ryan and Healey and on his inability to find records to that effect.

Thus, the Court is in some areas faced with the choice between the testimony of Mason on the one hand and that of Ryan, Healey and Hudtloff on the other. For a number of reasons, the Court is disposed to accept Mason's testimony as the more credible and accurate. Being retired, Mason no longer works for the government. Furthermore, he was obviously highly qualified to aid I.C.A. in its approval or disapproval of these rates. He testified at length concerning his role in connection with the transactions here in question and the ways in which the negotiations were culminated. His testimony is corroborated by and meshes with that of Dunn, and his knowledge of rate fluctuations in this very trade was corroborated by an analysis made during trial at the Court's suggestion of numerous cablegrams, Exhibits Nos. 1 through 4 attached to the Dunn Interrogatories, obtained from Dunn's Maritime Cargo Agency files. This record shows almost without contradiction that Mason had intimate contact with this particular trade in 1958 and 1959. His failure in his deposition to correctly recall some rather technical details, having had no opportunity to refresh his memory by reviewing agency records, does not derogate his testimony. Neither Ryan,

Healey nor Hudtloff were as involved in these matters as was Mason, and it would easily have been possible for Mason, as Chief, to have undertaken the responsibility of advising as to the reasonableness of these rates for I.C.A. without the knowledge of others in his very busy office. The Bloomfield shipments, less than fifty over a two-year period, were but a drop in the bucket compared with the total volume of work being done in the Branch.

Furthermore, the government failed to produce witnesses from I.C.A. to rebut the assertion made by Mason that he had undertaken the task of approving these rates at their suggestion. The failure of the government to produce the testimony of those government employees with whom Mason testified he communicated about the Bloomfield rates not only justifies but compels the inference that such testimony would have been unfavorable to the government.[16]

Thus, all the evidence before the Court is that the rates charged by Bloomfield were "fair and reasonable," although they were obviously in excess of the rates charged by Bloomfield on contemporaneous commercial shipments. The government made no attempt to show that Bloomfield's rates on their government-financed shipments were in excess of rates normally charged for similar service on government-financed cargoes, and there is adequate evidence to the effect that other shippers charge similar rates

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[16] See, e.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."); United States v. Johnson, 288 F.2d 40, 45 (5th Cir. 1961); Illinois Central R.R. v. Staples, 272 F.2d 829, 834 (8th Cir. 1959); Blumenthal v. United States, 189 F.Supp. 439, 448 (1960).

on government-financed cargoes. Nor did the government makes any attempt to show what were the "prevailing rates" which Bloomfield's rates on these shipments were not to exceed, other than by comparison with Bloomfield's rates on certain commercial grain shipments, most of which were on different ships and at different times than the shipments of government-financed grains. Perhaps there is no prevailing rate, but if there is one, in the fluid and changeable ocean freight market, even if commercial rates had been properly comparable, such an inexact comparison as made here by the government falls far short of establishing it.[17]

Cumulative of the foregoing and specifically the Court finds as follows with respect to the rates charged by Bloomfield on the government-financed cargoes involved here:

1. Such rates were fair and reasonable;

2. Such rates were not in excess of prevailing rates on shipments under the Cargo Preference Act;

3. Such rates did not exceed those rates which Bloomfield would have charged other shippers for government-financed cargoes under the Cargo Preference Act;

4. Such rates comply with the valid and applicable I.C.A. regulations;

5. Such rates did not exceed (a) those prevailing for similar freight contracts, nor (b) those paid to suppliers for similar ocean transportation, at or about the same time by other customers similarly situated;

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[17] Smith v. Joseph, 88 N.Y.S.2d 818, 820, 275 App.Div. 201.

6. Those Bloomfield customers which shipped commercial grains on Bloomfield vessels at rates which the government compared with Bloomfield's rates on government-financed grain shipments in an attempt to establish the illegality of the latter, were not similarly situated to the Bloomfield customers which contracted for the carriage of government-financed grain at rates here in controversy.

Even if the assumption was made for purposes of argument that American-flag commercial market rates were contemplated by the statute as appropriate ceilings, or that Bloomfield's rates were not in fact fair and reasonable, the additional question exists whether the government, which was not a party to the fixtures in controversy, may now impose upon Bloomfield a reexamination of the matters at issue. It is crystal clear from an analysis of the legislative history of the statute that the various agencies were only required to use United States-flag vessels when such vessels were available at fair and reasonable rates.[18] At any time an agency was unable to obtain American-flag vessels at such rates, it was freed of the shackles of the Act and could immediately turn to lower cost foreign shipping. The committee reports are replete with such declarations, and there is a large body of testimony that proffered rates were fairly often rejected upon being submitted by the negotiators to the appropriate government agency for approval. Thus, the statute clearly sets up the "fair and reasonable rate" test as a measure of availability of American shipping, with the agencies free to go elsewhere in the absence of American shipping meeting that

[18] See, e.g., footnote 7.

test of availability. There is absolutely no doubt that the statute does not require government agencies to accept any rates offered, with the operator being assumed to have warranted the fairness and reasonableness thereof.

Since it is reasonable to assume that the appropriate government agencies in this case reviewed the rates offered by Bloomfield to the German importers, as it would have been their duty to do under the Act, and since, and the Court so finds, the rates were either approved or accepted by officials in the agencies involved as fair and reasonable for purposes of measuring the availability of the Bloomfield ships, the serious question is raised whether the government should now be allowed to proceed on the theory that the rates were not fair and reasonable. Bloomfield, relying at the time these rates were contracted on agency and congressional interpretation which had been consistent from the time of the passage of the Act, had every reason to believe its rates were fair, reasonable and lawful, and were approved as such prior to acceptance. As a matter of statutory interpretation, if nothing else, the government should not now be allowed to take a contrary position on those rates, to Bloomfield's detriment. *Luckenbach S.S. Co. v. United States*, 280 U.S. 173, 182 (1930).

But, in addition, the government brings its action as one for money had and received, which is of an equitable nature, premised on the assertion that money is held by Bloomfield when in equity and good conscience it belongs to the government. See e.g., *Okeechobee County v. Nuveen*, 145 F.2d 684, 687 (5th Cir. 1944). To such action Bloomfield may interpose any defense that shows the government in equity and good conscience is not entitled to recover. In the absence of a frustration of the laws or public policy,

the government may not invoke the aid of a court of equity if its conduct is such that it comes into court with unclean hands. *Deseret Apartments v. United States*, 250 F.2d 457, 458 (10th Cir. 1957). For the government to request, as it does here, for the Court to grant a crippling $270,000 recovery against a party which the Act was primarily designed to protect, which reasonably believed its rates to have been accepted by I.C.A. as fair and reasonable, which might well have been unwilling to offer for these cargoes at lower rates, and which might have been able to substitute commercial cargoes of any of a number of types for satisfactory rates had I.C.A. refused its rate offers on these shipments, does not satisfy the requirement that it do equity in order to receive equity. Moreover, the Court feels that to permit such a recovery would constitute a violation of the spirit as well as the letter of the Act.

This is not a case in which the government has no protection. The very provisions of the Act provide ample safeguards, and in fact the Act will not have all of its desired and desirable effects unless government agencies reject rate offers which are not fair and reasonable. If the government had attempted to show the Court with appropriate evidence that the rates were not in fact fair and reasonable, the outcome might have been different. That has not been done. The government has wholly failed to carry its burden. Furthermore, Bloomfield has presented totally satisfactory evidence to support the fairness, reasonableness and lawfulness of its rates. The government is therefore entitled to no recovery against Bloomfield.

This Memorandum Opinion and Order shall constitute the Findings of Fact, Conclusions of Law and Order of this Court, which the Clerk shall file and of which he shall furnish each of the parties a copy.

DONE at Houston, Texas, on this 13th day of March, 1964.

JAMES NOEL

United States District Judge

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ICA-11-2 (10-56) PA	TRIANGULAR SECTION 402 PROCUREMENT AUTHORIZATION	1. COOPERATING COUNTRY: Germany (Fed. Rep.)	2. AUTHORIZATION NO.: 09-010-00-M1-8102
	INTERNATIONAL COOPERATION ADMINISTRATION WASHINGTON 25, D.C. UNITED STATES OF AMERICA	3. APPROPRIATION SYMBOL: 72-1181948	4. ALLOTMENT SYMBOL: 828-20-240-03-53-81
		5. CONTRACTING PERIOD: FROM- May 7, 1958 ENDING- Nov. 30, 1958	6. DELIVERY PERIOD: FROM- May 7, 1958 ENDING- Feb. 28, 1959

7. COMMODITY OR SERVICE DESCRIPTION	8. COMMODITY CODE	ORIGINAL ☒ AMENDMENT NO.
Bread Grains	010	A1-5/12

9. BANKING INSTITUTION	10. APPROVED APPLICANT

11. AREA OF SOURCE	12. AUTHORIZATION VALUE — AUTHORIZED CURRENCY: U.S. DOLLARS			
	PREVIOUS TOTAL (a)	INCREASE (b)	DECREASE (c)	TOTAL TO DATE (d)
United States		4,000,000		4,000,000

13. SPECIAL PROVISIONS

A. This authorization is based on approximately 62,000 metric tons (61,000 long tons or 2,270,000 bushels) in bulk, calculated on FOB basis, but is not limited to that quantity.

B. Wheat supplied under this authorization is limited to Hard Red Spring and/or Hard Red Winter Wheat U.S. Grade #2 or better.

C. ADDITIONAL DOCUMENTATION REQUIRED FOR REIMBURSEMENT: Supplier must furnish: (1) Certificate of origin, either endorsed on or attached to invoice required under Section 201.18(a)(4) of ICA Regulation I reading as follows: "The undersigned certifies that the commodity comprising this shipment was grown within the continental boundaries of the United States."

IN THE CASE OF WHOLE GRAIN PROCURED UNDER THIS AUTHORIZATION. (2) One copy (or photostat) of Certificate(s) of weight on which it is indicated that the weight of the commodity was determined by a licensed, bonded, or sworn weigher. (3) One copy (or photostat) of Certificate(s) of inspection showing grade, and containing a statement to the effect that the grade of the commodity was determined in accordance with the Official Grain Standards of the United States.

D. Apart from the documentation required for reimbursement by Section 201.18 of ICA Reg. I and any other special provisions of this authorization, sub-authorizations under this authorization will require suppliers to airmail a copy (or photostat) of each bill of lading and of each charter party (where applicable) to ICA, Office of Transportation, Washington 25, D.C. as soon as such documents become available to the supplier.

E. Ocean Transportation and related expenses (Code 950) on the above commodity purchased on FOB or FAS basis are eligible for reimbursement hereunder.

REF: PAA 29 *(See reverse side for general provisions)*

RECIPIENT COUNTRY ACCEPTANCE COPY
To be countersigned and returned promptly to Program Methods & Control Branch, ICA

ACCEPTANCE

The cooperating country hereby acknowledges receipt of this Authorization and confirms that the assistance described herein has been requested and is to be furnished in accordance with and subject to the terms and conditions set forth herein.

Willy Fritsch

May 2, 1958 — DATE

Willy Fritsch, Econ. Secr. — FOR THE COOPERATING COUNTRY

DATE OF ORIGINAL ISSUANCE	DATE OF THIS ISSUANCE
Apr. 30, 1958	Apr. 30, 1958

FOR THE DIRECTOR, ICA

GENERAL PROVISIONS

AUTHORITY

This authorization is issued under the authority contained in the Mutual Security Act and is subject to the terms and conditions herein specified and the provisions of ICA Regulation 1 as amended at any time up to the date of issuance of this authorization.

LETTER OF COMMITMENT

TO U. S. BANKING INSTITUTION SPECIFIED IN BLOCK 9

In consideration of your issuance or confirmation at your option of one or more commercial letters of credit or making at your option payment to suppliers (no such letter of credit to have a maturity, and no such payment to be made, later than the last day of the month following the terminal delivery date specified in Block 6 of this authorization), in accordance with application or request therefor by the Approved Applicant, the Director agrees with, and guarantees to you that, in accordance with the said Act, he will make reimbursement (without addition of interest or of your commissions, expenses or other charges) to the Approved Applicant in the manner and subject to the terms and provisions of Sections 201.16(c) and 201.22 of ICA Regulation 1, as in effect at the date hereof, of all amounts paid by you at sight under any such commercial letter of credit for the account of the Approved Applicant and the amount of all payments made by you at sight to suppliers for account of the Approved Applicant, up to but not exceeding the dollar amount specified in Block 12(D), for the procurement of the commodity or service specified herein, and subject to the special provisions referred to below. The making of reimbursement hereunder shall be governed solely by the terms and provisions of said Sections 201.16(c) and 201.22, incorporated herein by reference, and shall not be affected by any rights that the Director or the United States Government may have against the cooperating country, the Approved Applicant or third parties. In any action taken by you hereunder, you may rely fully on the authorities and signatures of the Approved Applicant as designated and identified by the Director or known to you from your own records.

You will be concerned only with the special provisions shown in Block 13 of this authorization under the heading "U.S. Banking Institution Responsibilities".

You are hereby approved as an assignee of the moneys due and to become due under this authorization.

If this commitment is satisfactory to you, please sign and return one copy of this authorization to the ICA issuing office.

ACCEPTED FOR THE U. S. BANKING INSTITUTION

DATE _____ SIGNATURE _____

SPECIAL PROVISIONS

This PA is issued against the special allotment of Sec. 402 funds for Triangular Trade in accordance with the following provisions:

1. The Government of the Federal Republic of Germany will deposit into a special account in the name of the U.S. Disbursing Officer, American Embassy, Bonn, Germany, upon notification of dollar disbursements by the ICA for commodities purchased by the Federal Republic of Germany under this program, an amount of Deutsche Mark equivalent to such dollar disbursements. The conversion rate to be used in determining the amount of Deutsche Mark equivalent to dollar disbursements shall be the fixed rate of DM 4.20 to $1.00.

2. Upon receipt by the Government of the Federal Republic of Germany of any procurement authorization issued by the ICA for commodities and/or transportation under this program, the Government of the Federal Republic of Germany will make advance deposits into the special account described in paragraph 1 in amounts requested by ICA to cover Deutsche Mark LCAs to be issued to aid-receiving countries; such advance deposits to be made by the Federal Republic of Germany within five days of request and will not exceed 50% of the total value of this PA.

3. The Government of the Federal Republic of Germany agrees to the separate application of Sec. 201.6 (N) of ICA Regulation I to transactions financed under this authorization and companion authorizations. The ICA will reimburse the Government of the Federal Republic of Germany in Deutsche Mark in the amount by which the transportation costs incurred for shipment on US flag commercial vessels exceed transportation costs which would have been incurred for shipment as of the same time on non-US flag commercial vessels. This amount will be established by the Office of Transportation of ICA, based on the request of the Government of the Federal Republic of Germany supported by documentary evidence establishing such differential within not more than sixty days after each shipment of the commodity has been booked or chartered. The reimbursement shall be made out of the Deutsche Mark deposited by the Government of the Federal Republic of Germany in accordance with paragraph 1.

4. The ICA will use the Deutsche Mark amount deposited pursuant to paragraphs 1 and 2 to finance the purchase in the Federal Republic of Germany of such commodities certified by suppliers to be of West German origin to be exported to such countries receiving aid from the Government of the United States as the ICA shall determine. It is the intention of the ICA to utilize for this purpose the Deutsche Mark deposited as rapidly as possible. ICA will consider the views of the Government of the Federal Republic of Germany in determining the utilization of the Deutsche Mark.

5. The Government of the Federal Republic of Germany will take all steps necessary to insure that its acts or rules result in no restrictions upon the use by the ICA of the Deutsche Mark deposited pursuant to paragraphs 1 and 2, which are discriminatory as to price, availability of commodities for export, or in any other way compared with purchases made in the Federal Republic of Germany by any other foreign purchasers using any currency.

6. It is understood that by virtue of Section 9 (d) of the Mutual Security Act of 1955, there is no US flag vessel shipping preference for the shipment of commodities from the Federal Republic of Germany to countries receiving aid from the Government of the United States which have been purchased with Deutsche Mark deposited pursuant to paragraphs 1 and 2.

SPECIAL PROVISIONS (Cont.)

7. Purchase of any US surplus agricultural commodities under this Agreement by the Government of the Federal Republic of Germany will not diminish or delay its purchases of the same commodity pursuant to any existing agreement under Section 402 of the Mutual Security Act of 1954, as amended, or any procurement authorization issued thereunder.

8. The Government of the Federal Republic of Germany agrees that the utilization by the ICA of any Deutsche Mark advanced by the Government of the Federal Republic of Germany pursuant to paragraphs 1 and 2 shall impose no obligation upon the Government of the United States to make any reimbursement to the Government of the Federal Republic of Germany except in US surplus agricultural commodities under the program described in this agreement.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 737

BLOOMFIELD STEAMSHIP COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner is an American steamship company which in 1958 and 1959 carried 48 parcels of bulk grain financed by the International Cooperation Administration ("ICA") between ports in the United States and ports in Northern Europe. The written agreements ("booking notes") between the parties incorporated applicable ICA regulations, which included a provision (22 C.F.R. (1958 rev.) 201.7(b)) that the rate charged should not exceed that paid "for similar ocean transportation service by other customers similarly situated" (R. 57). Payments for shipment were made from government funds upon receipt of an invoice to which a "Supplier's Certificate" was attached. The certificate stated (R. 65–66):

> * * * the rate indicated on the reverse of this form for the service rendered does not exceed

> the prevailing rate, if any, for similar services, or the rate paid to the supplier for similar services by other customers similarly situated.

The rates charged ICA were, in fact, approximately $270,000 more than those which would have been charged by petitioner to commercial shippers for the same shipments.[1] Petitioner instituted this action for a declaratory judgment that it was not liable for the overcharge, and the United States counterclaimed for the amount of the overcharge. The district court rendered judgment for petitioner on the ground that the ICA regulation and the clause in the certificate required parity only among the rates of all government-financed shipments and did not contemplate that rates for government-financed shipments would be measured against purely commercial rates (Pet. App. 10a–49a). The court relied, for this conclusion, on the Cargo Preference Act, 46 U.S.C. 1241(b), which it construed as prescribing an independent "fair and reasonable" standard for rates to be charged by American-flag vessels for government-financed shipments (Pet. App. 18a–34a). The court of appeals reversed, holding that the contract terms created an "express warranty" that the rates charged on the government shipments were no higher than those paid by commercial customers (Pet. App. 3a–6a) and that the Cargo Preference Act did not prevent carriers from being bound by such an agreement (Pet. App. 7a–9a).

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[1] Petitioner actually carried commercial shipments on some of the same vessels transporting the ICA shipments, so that the commercial rates are determinable by reference to the terms of those shipments.

The decision of the court of appeals was correct and does not conflict with any decision of this Court or of any other federal court. There is no warrant for reading the words "similarly situated" in the regulation and the certificate as limited to government-financed shipments. The clauses plainly meant that petitioner undertook not to charge the United States government more than it would charge other customers—private or public—for similar service between similar ports. Nor does the Cargo Preference Act, which directs agencies of the government to make 50 percent of their overseas shipments on American-flag vessels "to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels * * *," disable the government from negotiating a contract with an American shipper whereby it is assured that rates on government-financed shipments will be no higher than rates on commercial shipments. The fact that Congress and executive departments anticipated that the Cargo Preference Act would result in generally higher shipping costs than if the government were free to employ foreign-flag ships (Pet. 8–19) plainly does not establish that American-flag ships were accorded an unconditional license to charge higher rates for government-financed shipments than for private shipments.

In any event, the question presented here is of no continuing importance.[2] Consequently, we respect-

[2] We are advised by the General Accounting Office that only two steamship companies have been found to have charged the government higher rates than private customers in similar circumstances under certificates such as those involved here. The

fully submit that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

DECEMBER 1966.

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dispute with the other company has been settled. Hence the only effect of this litigation appears to be as to petitioner's past rates.

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No. 737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BLOOMFIELD STEAMSHIP COMPANY
Petitioner

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF

The Memorandum of the Government says (page 3)*:

> "In any event, the question presented here is of no continuing importance."

This statement misses the point. According to the Court of Appeals, construction of the certificates requires a construction of the Shipping Act of 1916 under which,

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* The Memorandum supports this statement by a report of advice from the General Accounting Office that only two companies had executed "certificates such as those involved here" under "similar circumstances." This statement is valid only if the quoted phrases are used in a highly restrictive sense.

According to the report of the Maritime Administrator referred to at page 16 of the petition, in the year 1964, which the report says is the only year for which statistics are available, 11 of the 14 subsidized carriers, all seven of the "non-subsidized berth type operators" and the "irregular service carriers", who are treated as a group, participated in both "non-differential cargo" and "differential cargo" under Public Law 480 programs, that is to say, carried agricultural commodities at both U. S. flag and foreign flag rates. It may be that the Government as of the present moment defines "similar circumstances" to mean other parcel shipments on the same voyage. Cf. footnote 1, page 2, of the Government Memorandum. Further, after the decision in this case by the

as interpreted by the Court of Appeals, it is an illegal preference for a U. S.-flag carrier which has carried cargo required to be shipped U. S.-flag at a U. S.-flag differential rate to carry similar cargo not required to be shipped U. S.-flag at the world market rate. This construction is obviously of outstanding importance. If it is correct, U. S.-flag carriers are for practical purposes forbidden to carry agricultural commodities in bulk commercially (Petition pages 8-9).

If, on the other hand, the Government is now telling us that the Shipping Act has no such meaning—and indeed the Government's Memorandum fails even to mention the Shipping Act—and that Bloomfield did what it had a perfect right to do except that it was so stupid as to sign the certificates, then the whole premise of the construction of the certificates by the Court of Appeals fails. On that hypothesis there is no basis for treating the shippers of gigantic cargoes who are required to use a merchant marine consisting of less than one-tenth of the world's shipping fleet as "similarly situated" to shippers who may ship under any flag.

The Government had no such concept of the case in the Court of Appeals. There its plea was grounded on the Shipping Act of 1916, on cases saying that that Act was to be construed like the Interstate Commerce Act and on cases under the Interstate Commerce Act such as *Wight* v. *United States*, 167 U. S. 512 (1897). The opinion of the Court of Appeals adopted these arguments.

District Court, ICA issued new regulations effective November 1, 1964 providing, with regard to "Maximum Liner Rates," and insofar as relevant here, that such rates must not exceed "the lowest rate charged by the carrier for similar shipments on the same voyage." CFR §201.67(a)(4)(iii). However, many of the private shipments involved here were not on the same voyage as the Government aided shipments. As we read the decision of the Court of Appeals, it does not lend itself to the limited interpretation on which the Government now seeks to avoid review.

We can only suspect that, having won the case in the Court of Appeals on one theory, the Government now seeks to avoid review by this Court on another.

The Government says (page 3) that the Cargo Preference Act "plainly does not establish that American-flag ships were accorded an unconditional license to charge higher rates for government-financed shipments than for private shipments."

The Cargo Preference Act required that one-half the enormous shipments of Government-aided bulk grain be by U. S.-flag carriers. The inevitable consequence was—under the law of supply and demand—a rate differential vis-a-vis shippers not so required, a result Congress anticipated and both Congress and the executive departments thereafter recognized.

This case does not present the question whether U. S.-flag carriers can charge, for Government-aided cargo, rates higher than world market rates for private cargo—that right is not challenged; what is presented is the question whether, doing so, they can also carry private cargo at world market rates.

We can not believe that Congress intended by the Cargo Preference Act to exclude U. S. flag carriers from the commercial carriage of cargo which, when Government-aided, was carried at the differential rate.

The need is urgent that this Court construe the Cargo Preference Act.

December, 1966

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